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Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PERRY BELLAMY,

Petitioner,

v.

WILLIAM COGDELL, Warden, Brooklyn House of Detention,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

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December 4, 1992

QUESTION PRESENTED

Should a violation of a criminal defendant's Sixth and Fourteenth Amendment rights be presumed, as a matter of law, when (a) the defendant's trial attorney was facing suspension during the course of the defendant's trial on grounds of physical and mental incapacity based upon the attorney's own admission and his physician's statement, (b) the attorney avoided immediate suspension before defendant's trial commenced by representing to state disciplinary authorities that he "of course" would not try the defendant's case by himself, (c) the attorney proceeded to try the defendant's case without the assistance of other counsel and without advising the defendant of his predicament, and (d) the attorney was thereafter suspended indefinitely "to protect the public" on the ground that the attorney was, by his own admission, "incapable of practicing law"?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Perry Bellamy petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 8, 1992.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Second Circuit is reported at 974 F.2d 302

(2d Cir. 1992) and is reproduced in the appendix at 1a. The panel opinion of the United States Court of Appeals for the Second Circuit is reported at 952 F.2d 626 (2d Cir. 1991) and is reproduced in the appendix at 29a. The memorandum and order of the United States District Court for the Eastern District of New York will be reported in F.Supp. and is reproduced in the appendix at 53a.

JURISDICTION

Perry Bellamy petitioned the United States District Court for the Eastern District of New York for a writ of habeas corpus after exhausting his state-court remedies with respect to a criminal conviction in the State of New York. The district court denied the petition. On appeal, a panel of the United States Court of Appeals for the Second Circuit reversed and directed the district court to grant the writ. After a rehearing en banc, the court, divided seven to six, entered a judgment on September 8, 1992 affirming the district court.

The petitioner invokes the jurisdiction of this Court to review the judgment of the Second Circuit under section 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1, cl. 2.

STATEMENT OF THE CASE

"The facts in this case are largely undisputed." App. 3a. The petitioner was charged in state court with

participation in the murder of a parole officer. His mother retained attorney Sidney Guran, then semi-retired and living in Florida, to represent him.

Several months before the trial was to begin, the departmental disciplinary committee brought charges of professional misconduct against Guran and set a hearing. Guran's attorney sought an adjournment of the disciplinary hearing "because Guran was then 'not mentally capable of preparing for the hearing.'" App. 4a. Guran's attorney "based his evaluation of Guran's capacity on phone conversations with Guran in which he found 'a certain amount of disorientation.'" App. 4a. He also submitted a letter from Guran's physician. The letter stated in part,

> For the past six weeks, the patient has been undergoing intensive evaluation of a progressive polyneuropathy, characterized by peripheral motor weakness, unsteadiness on his feet and, at times, an inability to concentrate. . . .
>
> . . . In face of these medications and the severe physical and emotional stress related to the recently found neuropathy, Mr. Guran has been affected emotionally and physically, and has been virtually

> incapacitated over the last six to eight weeks. The prognosis for his neurologic condition is uncertain at this time. . . .
>
> It is anticipated that evaluation and treatment of this current new problem will take at least three to six months, and that Mr. Guran will be effectively incapacitated during that time.

Based on the physician's statement that Guran "will be effectively incapacitated" for "at least three to six months" and the statement from Guran's lawyer that Guran is "not mentally capable of preparing for the hearing," the departmental disciplinary committee moved to suspend Guran immediately from the practice of law. App. 5a.

Less than 1 month before petitioner's trial, Guran responded with an affidavit "in which he admitted his medical problems" but argued that a suspension was unnecessary because he had been retired and had taken on no new matters other than the petitioner's criminal case. App. 5a.

> There is no necessity for a suspension. I have not taken any new work since my 70th birthday in 1984, except one case which is pending in the Supreme Court, Queens

> County, People vs. Perry Bellamy, indictment #5382/85. . . .
>
> . . . When he was first arrested his mother called me and when I told her of my retirement, and the fee I would need to come out of retirement . . . . *Mrs. Bellamy then made an agreement with me and has almost paid the full fee we agreed upon which I can no longer return because I no longer have it.*
>
> . . . .
>
> *I, of course, will not attempt to try this case by myself.* I will have a competent attorney, but I must be present to assist him. Bellamy relies on, and strictly trusts only me and his mother has paid me. . . .
>
> *I factually state that except for this case I will not engage in the practice of the law until my health has improved to the point where there is no question as to the protection of a client.* In light of my action and commitment there is no necessity for a suspension to which is attached an unwarranted and unnecessary stigma.

(emphasis added). At the time this commitment was made, however, "Guran conceded that he had spent the retainer Bellamy's mother had paid." App. 24a (Feinberg, J.,

dissenting). So, it was not clear how Guran was to retain other counsel.

The day before he submitted the affidavit, Guran told the trial judge in a letter about the disciplinary proceeding and his health. Guran told the court, "I am feeling better, and have secured the services of Marvin D. Skedelsky, Esq., . . . an experienced trial lawyer . . . . He will be available to help in this trial because my client trusts only me--as does his mother." But, as the dissent noted,

> [T]he letter strongly implied that Guran--not Skedelsky--would be the lead counsel, contrary to the representation Guran made the very next day to the Appellate Division. Moreover, Guran did little to carry out his promise to get Skedelsky to help him, either as "second seat" or as lead counsel. Although Guran mentioned to Skedelsky that he "might" seek his assistance in trying the Bellamy case, Guran never actually requested such assistance until the eve of trial. . . .
>
> The lukewarm efforts to secure a lawyer to "assist" were the result of the fact that Guran, who conceded that he could not repay the retainer if he was unable to try the Bellamy case, apparently did not have funds to retain other counsel. Guran knew this at the time he promised the Appellate Division

> that he would not try the case alone and would merely assist another attorney, and his promise was thus misleading.

App. 24a-25a.

Skedelsky did not appear, and Guran represented the petitioner alone at the 2-week trial. As the district court noted, "[t]he jury's resolution of the case was by no means easy. Only after five days of deliberation did it return its verdict of guilty." App. 64a.

Two months later, the Appellate Division, First Department suspended Guran indefinitely on the ground that "he is, at this time, incapable of practicing law." *In re Guran*, 126 A.D.2d 216, 217, 513 N.Y.S.2d 402, 403 (1st Dep't 1987). The appellate division, which acted in response to Guran's affidavit submitted prior to petitioner's trial, explained,

> Since [Guran] maintains that he is not mentally capable of preparing for a hearing, he implicitly concedes that he is, at this time, incapable of practicing law. The obligation of this Court, in such matters, is to protect the public. This obligation can properly be discharged only by suspending [Guran] until a

> determination is made that he is mentally capable of resuming the practice of law.

Id.

It was undisputed that Guran had not told Bellamy before the criminal trial about the disciplinary charges against him, his admission of incapacity, or his representation that he would not try the case by himself. Bellamy found out about his lawyer's suspension at his sentencing when the trial judge told Bellamy that Guran could not represent him due to his suspension. App. 25a.

Although the majority said it was unclear what effect Guran's misrepresentation that he would retain another lawyer to defend the petitioner had on the motion for immediate suspension, App. 13a, the dissent concluded that

> the only reasonable inference is that the Appellate Division would have suspended Guran immediately or prevented him from trying Bellamy's case if it had known he would not be honoring his promise. Guran admitted his incompetence and falsely promised to take preventive actions for the express purpose of avoiding a suspension. . . . It is unrealistic to assume that Guran's course of conduct did not bring about the

> desired result, i.e., no suspension and no need to hire another attorney as lead counsel.

App. 25a-26a.

After exhausting his state-court remedies,[1] Bellamy petitioned the United States District Court for the Eastern District of New York for a writ of habeas corpus claiming that he was denied per se the effective assistance of counsel.[2] The district court concluded that a per se rule applied when, unknown to the defendant, his counsel was not authorized to practice law in any state. App. 79a (citing *United States v. Novak*, 903 F.2d 883 (2d Cir. 1990); *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983)). But the district court denied relief because it found that trial counsel had been admitted to practice and "at the time of trial, the

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[1] *People v. Bellamy*, 160 A.D.2d 886, 554 N.Y.S.2d 320 (2d Dep't) (direct appeal), *petition for leave to appeal denied*, 76 N.Y.2d 784, 559 N.E.2d 683, 559 N.Y.S.2d 989 (1990); *People v. Bellamy*, N.Y.L.J., May 15, 1989 (2d Dep't May 9, 1989) (denial of leave to appeal state-court collateral attack on conviction).

[2] The district court had subject-matter jurisdiction of Bellamy's petition under section 1331 of the Judicial Code, 28 U.S.C. § 1331.

state court had neither suspended counsel nor even sought to limit his practice of law." App. 80a-81a.

On appeal, a divided panel of the Second Circuit reversed. Speaking for the majority, Judge Feinberg found "there was per se ineffective assistance of counsel." App. 40a.

> [W]hen an attorney is admittedly incapable of preparing for a hearing to be held a week or two before a criminal trial, when that incapacity is the ground for suspension from practice shortly after the trial, when that suspension would almost certainly have occurred prior to the criminal trial but for an unfulfilled promise to be assisted by competent counsel during the trial, and when the attorney's client is ignorant of all of this, we feel obligated by our cases to hold on such unusual facts that the client has been denied the effective assistance of counsel guaranteed a defendant by the Constitution.

App. 39a-40a. Judge Altimari dissented, arguing that the per se rule did not apply because "Guran *was* duly licensed at the time of trial." App. 40a (emphasis in original).

On rehearing en banc, a closely-divided Second Circuit affirmed the judgment of the district court. Speaking

for the seven-member majority, Judge Altimari concluded that the "narrowly crafted *per se* rule does not apply" because Guran was admitted to practice "and there is no basis to recast reality and treat him as if he were not." App. 3a, 13a. The majority also concluded that the district court properly deferred to the state-court fact finding that Guran "was mentally and physically capable to try the defendant's case and did so in a competent manner" (even though the state court had refused to compel Guran's testimony at the hearing on Bellamy's claims) and that there was no denial of effective assistance of counsel. App. 16a.

Writing for the six dissenters, Judge Feinberg explained that the Second Circuit had applied a per se rule when a lawyer was not licensed, *see Solina v. United States*, 709 F.2d 160 (2d Cir. 1983), and when a lawyer obtained a license through misrepresentation, *see United States v. Novak*, 903 F.2d 883 (2d Cir. 1990). And he said that a per se rule applied in this instance because Guran, who conceded that he did not have the mental capacity to defend himself, had avoided suspension and retained his ability to appear as

Bellamy's attorney only through an unfulfilled promise to the appellate division. "Had there been no such misrepresentation, Guran's suspension would have taken place before Bellamy's trial and Guran could not have defended him."[3] App. 26a.

REASONS FOR GRANTING THE WRIT

The showing required of an accused to establish a violation of the right to the assistance of competent counsel when his attorney has resigned, has been suspended, or has been disbarred from practice presents an important question of federal law that has divided the courts of appeals and should be settled by this Court. As will be seen, two lines of authority have emerged. One, following the Second Circuit's decisions in *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983), and *United States v. Novak*, 903 F.2d 883

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[3] Judge Feinberg alternatively would have granted a remand "to allow the district court to conduct a hearing under *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]," reasoning that "[t]he state court's failure to permit Bellamy to call Guran as a witness deprived Bellamy of a fair opportunity to develop the record as to the effectiveness of his counsel." App. 27a.

(2d Cir. 1990), requires the court to examine the basis for the resignation, suspension, or disbarment to determine whether it reflects counsel's competence. If so, the denial of effective assistance of counsel is presumed and reversal of the conviction is automatic. The other, represented by the Ninth Circuit's decision in *United States v. Mouzin*, 785 F.2d 682 (9th Cir.), *cert. denied*, 479 U.S. 985 (1986), assumes that counsel is competent by reason of the prior admission to the bar. Under this approach, the accused must show actual deficiencies in counsel's representation coupled with prejudice to prevail on the Sixth Amendment claim.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set out a two-pronged test of reasonableness and prejudice by which most claims of ineffective assistance of counsel were to be judged. The Court also recognized that there remained a class of cases involving the actual or constructive denial of counsel in which prejudice was presumed. *Id.* at 692. Since the decision in *Strickland*, this Court has not clarified the boundaries of those cases in which this per se rule is applied. Consequently, the lower

federal courts have been inconsistent in their application of the per se rule to frequently recurring claims of denial of counsel in cases involving attorney suspensions and disbarments.

Following Judge Friendly's lead in *Solina v. United States*, the courts have recognized that an accused is denied his right to counsel as guaranteed by the Sixth Amendment when, unknown to him, "his representative was not authorized to practice law in any state, and the lack of such authorization stemmed from failure to seek it or from its denial for a reason going to legal ability, such as failure to pass a bar examination, or want of moral character." 709 F.2d at 167; *United States v. Dumas*, 796 F. Supp. 42, 46 (D. Mass. 1992) ("many courts have held that if a defendant is convicted while represented by someone *who has never been admitted to any court's bar*, that defendant is deemed to have been denied counsel as a matter of law"); *see, e.g. Mouzin*, 785 F.2d at 697 ("defendant's right to effective assistance of counsel would be violated where he is represented by a person posing as a lawyer who had not

been admitted to any bar"); *Harrison v. United States*, 387 F.2d 203, 212-14 (D.C. Cir. 1967) (conviction reversed on ground that prosecution used statements of defendant from an earlier trial in which he was represented by an exconvict posing as a lawyer), *rev'd on other grounds*, 392 U.S. 219 (1968). In such cases, a per se violation of an accused's right to effective assistance of counsel occurs for, as this Court explained, in some "Sixth Amendment contexts, prejudice is presumed." *Strickland*, 466 U.S. at 692. Thus, it is not necessary to show whether counsel's assistance was reasonable and whether, but for counsel's error, the result of the trial would have been different. "Under this *per se* rule the defendant is entitled to a new trial even where the actual representation was beyond reproach." *Dumas*, 796 F. Supp. at 46.

Judge Friendly recognized in *Solina* that technical defects in the licensing of an attorney--such as a failure to take the oath or a failure to apply for admission *pro hac vice*--would not result in a Sixth Amendment violation. 709 F.2d at 167 & n.9. And in *United States v. Novak*, the

Second Circuit, speaking through Judge Kearse, later reemphasized the distinction between such technical defects and "a serious substantive flaw," such as a failure to take the bar examination, a failure to pass the bar examination, or a failure to demonstrate good moral character. 903 F.2d at 888. *Novak* involved an instance in which an attorney misrepresented his qualifications to gain admission to the bar, and the court, applying the "substantive-technical dichotomy," concluded that his later representation of an accused denied his client effective assistance of counsel even though the attorney technically was in good standing at the time of the trial. *Id.* at 884-86, 890.

Conversely, in *United States v. Costanzo*, 740 F.2d 251 (3rd Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985), there was no denial of counsel even though the accused's lawyer had been suspended in one state for nonpayment of dues and in another state for commingling funds. The attorney was admitted in the neighboring federal courts, and the Third Circuit, using language suggestive of the substantive-technical dichotomy, explained,

> This is not a case involving representation by one without legal training or who was not a member of any bar. Nor is it significant that [the attorney] does not appear to have been formally admitted *pro hac vice* until the end of the fourth day of trial. As long as one is represented by an attorney who could have been admitted *pro hac vice* at the beginning of the trial, the failure to be formally admitted does not raise sixth amendment concerns.

740 F.2d at 258. Similarly, in *United States v. Lewis*, 786 F.2d 1278 (5th Cir. 1986), the court of appeals found no denial of effective assistance of counsel when the defendant's attorney was not admitted to practice in federal court--a technical defect. The attorney qualified for admission, and when the district court discovered that the accused's lawyer was not admitted, it allowed him to enroll. *Id.* at 1282.

In many cases involving resignations, suspensions, and disbarments, the courts have applied this distinction (between substantive and technical defects in an attorney's status) in deciding whether a criminal defendant has been denied effective assistance of counsel as a matter of law, without regard to whether the defendant can show prejudice under *Strickland*. *Novak*, 903 F.2d at 889 (collecting cases).

The imposition of discipline on an attorney otherwise qualified does not necessarily destroy his status as counsel under the Sixth Amendment. *E.g.*, *Dumas*, 796 F. Supp. at 46. But a suspension or disbarment stemming from the inability to represent clients disqualifies the attorney from providing effective assistance. Thus, in *United States* ex. rel. *Reese v. Peters*, 713 F. Supp. 1178, 1182 (N.D. Ill. 1989), the district court found no denial of counsel when an attorney had been suspended from practice for failing to pay bar dues because the reason for the suspension did "not call into question the attorney's ability to perform within constitutional standards." On appeal, Judge Easterbrook, writing for the Seventh Circuit, phrased the inquiry more broadly.

> The *constitutional* question is whether the court has satisfied itself of the advocate's competence and authorized him to practice law. Mountebanks . . . and persons who obtain credentials by fraud . . . are classes apart from persons who satisfied the court of their legal skills but later ran afoul of some technical rule. Lawyers who do not pay their dues violate a legal norm, but not one established for the protection of clients . . . .

Reese v. Peters, 926 F.2d 668, 670 (7th Cir. 1991) (emphasis in original).

Not all courts have used the substantive-technical dichotomy to determine whether there was a per se denial of counsel in cases involving suspension or disbarment. In *United States v. Williams*, 934 F.2d 847, 851-52 (7th Cir. 1991), the court of appeals required the accused to show prejudice to his defense when he was represented by an attorney that had been suspended by a state court for professional misconduct arising out of his neglect of legal matters entrusted to him. The court expressly rejected a per se rule, and it did not discuss whether the discipline implicated the lawyer's ability to effectively represent his client. And in *United States v. Stevens*, Nos. 91-3374, 92-3005, 1992 WL 301804, at *2 (10th Cir. Oct. 26, 1992), the Tenth Circuit refused to employ a per se rule when the accused's counsel had been disbarred by the district court just before the trial. The court of appeals did not discuss the reason for the disbarment; it simply relied on the lawyer's continued admission to practice before the state courts. *Id.*

See also McDougall v. Rice, 685 F. Supp. 532, 539 (W.D.N.C. 1988) (accused required to show deficient performance and prejudice stemming from suspension orders against counsel; no discussion of basis of suspension); *United States v. Messer*, 647 F. Supp. 704, 706-07 (D. Mont. 1986) (requiring accused to show prejudice from representation by an attorney who recently had resigned from the bar; no discussion of reason for resignation).

These courts follow the approach of the Ninth Circuit in *United States v. Mouzin*, 785 F.2d 682 (9th Cir.), *cert. denied*, 479 U.S. 985 (1986). In *Mouzin*, the accused claimed ineffective assistance of counsel when, during the trial, his trial attorney had been disbarred permanently by the Ninth Circuit for "failing to meet deadlines, prosecute an appeal, and tendering a bad check to a Court Reporter." 785 F.2d at 687-88. On appeal, a panel of the Ninth Circuit refused to examine the underlying reason for the disbarment and judge whether it involved the advocate's competence.

> Neither suspension nor disbarment invites a per se rule that continued representation in an ongoing trial is constitutionally ineffective.

> Admission to the bar allows us to assume that counsel has the training, knowledge, and ability to represent a client who has chosen him.

Id. at 698. Instead, the panel required the defendant to show that his "lawyer's services were ineffective on a case, not a per se, basis." *Id.*

The dissent, on the other hand, first looked to the basis for the disbarment and, echoing the substantive-technical dichotomy, determined that the basis for the disbarment implicated the attorney's competence.

> The discipline imposed against the attorney in this case was for failing to protect his client's right to appeal, a classic example of refusing to represent a client's interests. Although [the attorney] proved he was sufficiently competent to pass a bar exam, he was utterly incapable of representing his clients.

Id. at 702 n.4. Because the disbarment stemmed from the attorney's capability to represent his clients, which, in turn, "threaten[ed] the foundation of the adversary process," the dissent rejected "the traditional ineffective assistance of counsel standard." *Id.* at 703. Instead, relying on Judge Friendly's opinion in *Solina* and the decision of the D.C.

Circuit in *Harrison v. United States*, it argued for a per se rule under which the reversal of the conviction was automatic. *Id.* at 703-04. According to the dissent, there was no principled distinction between a never admitted attorney and a disbarred one. *Id.* at 702 n.4. In each instance, the court was to examine the basis for counsel's status, and a per se rule applied when the reason for the suspension or disbarment implicated the lawyer's competence.

Presented with this division of authority--some courts examining the reason for the lawyer's status against the substantive-technical dichotomy; other courts requiring a showing of prejudice in all instances--it is easy to understand why the Second Circuit was divided so closely. Judge Feinberg, writing first for the panel and then in dissent, approached the issue of denial of counsel to Bellamy through the substantive-technical dichotomy anchored in Judge Friendly's opinion in *Solina*. Since Guran was suspended after trial for a condition that existed while he represented Bellamy and that reflected on his competence to represent

Bellamy effectively, and because Guran would have been suspended prior to trial but for his misrepresentation that he would obtain trial counsel for Bellamy, a per se rule was justified and the reversal of conviction automatic.

Judge Altimari, by contrast, followed the approach of the Ninth Circuit in *Mouzin*. Under such an analysis, once counsel has been admitted properly, a reversal of a conviction may be obtained only upon a showing of representation below the standard of reasonableness and of prejudice, a showing Bellamy did not make in the state-court hearing.

The claim of ineffective assistance of counsel arises frequently in the context of representation by suspended or disbarred attorneys. Thus, the issue presented by this petition--the use of a per se rule in instances in which counsel's competence is implicated by a resignation, suspension, or disbarment--recurs on direct appeal and on collateral attack of convictions. Given the division in the courts of appeals, the issue should be settled by this Court.

CONCLUSION

Perry Bellamy was tried and convicted while represented by counsel who had postponed his suspension from practice on grounds of incapacity by representing to the disciplinary authorities that "I, of course, will not attempt to try [Bellamy's] case by myself." A panel of the Second Circuit found a per se denial of effective assistance of counsel and upset Bellamy's conviction because the lawyer's suspension was on grounds that implicated his competence. The en banc court refused to disturb the conviction because Bellamy's lawyer had been properly admitted to practice at the time of Bellamy's trial and Bellamy did not satisfy the actual prejudice test set forth in *Strickland* at the state-court hearing.

This Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit because there is a division of authority between the United States courts of appeals on an important question of federal law and because the issue--the extent to

which a per se rule applies in cases of resignations, suspensions, and disbarments--is squarely presented by this petition. The petition for writ of certiorari should be granted.

Respectfully submitted,

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30974

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 438—August Term 1991

(Argued Before the In Banc Court: June 1, 1992
Decided: September 8, 1992)

Docket No. 91-2327

PERRY BELLAMY,

Petitioner-Appellant,

—v.—

WILLIAM COGDELL, Warden,
Brooklyn House of Detention,

Respondent-Appellee.

Before:

MESKILL, *Chief Judge*, FEINBERG, OAKES,
NEWMAN, KEARSE, CARDAMONE, WINTER,
PRATT, MINER, ALTIMARI, MAHONEY, WALKER,
and MCLAUGHLIN, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Eastern District of New York

(Raggi, *J.*), denying appellant's petition for a writ of habeas corpus.

Affirmed.

Judge Feinberg dissents in a separate opinion, joined by Oakes, Newman, Kearse, Cardamone, and Winter, *Circuit Judges*.

MICHAEL A. CIAFFA, Mineola, NY (Meyer, Suozzi, English & Klein, P.C., Mineola, NY, of counsel), *for Petitioner-Appellant.*

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ALTIMARI, *Circuit Judge*:

We granted rehearing *in banc* to consider whether petitioner-appellant Perry Bellamy suffered a *per se* denial of his right to counsel under the Sixth Amendment. The parties were also invited to brief the application of *Teague v. Lane*, 489 U.S. 288 (1989) to this habeas corpus proceeding. These issues arise from Bellamy's appeal from a judgment entered in the United States District Court for the Eastern District of New York, (Reena Raggi, *Judge*), denying Bellamy's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1988).

In a well-reasoned opinion, Judge Raggi rejected Bellamy's claims that he was denied: (1) effective assistance of counsel, either under a *per se* rule or under *Strickland v. Washington*, 466 U.S. 668 (1984); (2) due process; and (3) a full and fair opportunity to litigate his attorney's competence at a state court hearing held in connection with his motion to set aside his conviction pursuant to N.Y. Crim. Proc. L. § 440 (McKinney 1983). *Bellamy v. Cogdell*, No. 90-4245 (E.D.N.Y. June 28, 1991).

A divided panel of this court reversed the judgment of the district court, concluding that Bellamy suffered a *per se* denial of his Sixth Amendment right to counsel. *Bellamy v. Cogdell*, 952 F.2d 626 (2d Cir. 1991). On *in banc* review, we agree with the district court and hold that our narrowly crafted *per se* rule does not apply to the facts of this case. We therefore vacate the panel opinion and affirm the judgment of the district court.

BACKGROUND

The facts in this case are largely undisputed. In January 1987, Bellamy went on trial in New York Supreme Court, Queens County, for his charged participation in the murder of State Parole Officer Brian Rooney. Lorenzo "Fat Cat" Nichols, a notorious Queens drug dealer, ordered Rooney's murder from Nichols' jail cell. This "hit" was a revenge killing for Rooney's efforts in placing Nichols behind bars. The state's evidence at trial showed that, in exchange for $5,000, Bellamy lured Rooney to a park in Queens where associates of Nichols shot Rooney repeatedly as Rooney sat in his car. After almost three weeks of trial, including five days of jury deliberations, a jury convicted Bellamy of second degree murder and second degree criminal possession of a weapon. Bellamy was

eventually sentenced to fifteen years to life for the murder conviction and five to fifteen years for the weapon possession conviction, the sentences to run concurrently.

Over one year prior to the start of Bellamy's trial, Bellamy's mother contacted Attorney Sidney Guran to represent Bellamy. Although Guran was then retired and living in Florida, he had represented Bellamy numerous times in the past and agreed to represent him again. At that time, Guran was seventy-one years old and had been a duly admitted and successful member of the bar for almost fifty years.

In the months preceding and during Bellamy's trial, Guran was the subject of disciplinary proceedings in the Appellate Division, First Department. In October 1986, the Departmental Disciplinary Committee alleged that Guran had converted client funds in 1976 and had negligently handled a real estate transaction in 1977. The Committee scheduled a hearing on these charges for December 11, 1986. On November 10, 1986, Guran's attorney, Richard L. Baltimore, Jr., requested that the hearing be adjourned because more time was needed to compile documents for the hearing and because Guran was then "not mentally capable of preparing for the hearing." Baltimore based his evaluation of Guran's capacity on phone conversations with Guran in which he found "a certain amount of disorientation" and on a letter, dated October 29, 1986, from Guran's physician, Dr. Richard P. Cohen.

According to Dr. Cohen, Guran suffered from a variety of physiological ailments, including a recently diagnosed polyneuropathy, a condition "characterized by peripheral motor weakness [and] unsteadiness" on one's feet. Dr. Cohen had been treating Guran for that condition for the preceding six weeks. During that time, as a result of the

"physical and emotional stress" associated with Guran's recently discovered illness and of certain medications, Guran had been "virtually incapacitated." Dr. Cohen also noted that as a result of that condition, Guran "at times" had "an inability to concentrate." The prognosis for Guran's newly discovered condition was uncertain at that time, but Dr. Cohen "anticipated" that evaluation and treatment of the polyneuropathy would take three to six months, and that Guran would be "effectively incapacitated during that time."

Based on these communications, and on the underlying charges, the Disciplinary Committee filed a notice of petition with the First Department on November 21, 1986 seeking to have Guran suspended immediately and indefinitely from the practice of law. The accompanying petition recounted, among other things, the substance of the letters that Guran's attorney and physician had submitted to the Committee. In response, Guran submitted an affidavit to the First Department dated December 12, 1986, in which he admitted his medical problems, but stated that a suspension, with its attendant stigma, was unnecessary. According to Guran, he had been essentially retired since 1984, having taken on no new work except for Bellamy's case. Because of his prior representation of Bellamy and because of his familiarity with the case, Guran requested that he be permitted to represent Bellamy, stating:

> I, of course, will not attempt to try this case by myself. I will have a competent attorney, but I must be present to assist him. Bellamy relies on, and strictly trusts only me and his mother has paid me. It would be a complete disservice to this defendant and jeopardize his right to a fair trial if I were not permitted to assist in his trial and defense.

Neither the Disciplinary Committee nor the First Department ever responded to Guran's affidavit.

On December 11, 1986, Guran also advised the trial judge, John T. Gallagher, in an *ex parte* submission, about the pending disciplinary charges and his attendant health problems. Among other things, Guran informed Judge Gallagher:

> You might remember that I had a Dr. [sic] appointment . . . at N.Y. Hospital at which time a tentative diagnosis of [a form of polio commonly known as Lou Gehrig's Disease] was made. Needing time to prepare [for the disciplinary hearing scheduled for December 11, 1986], feeling miserable, [and] discouraged, I returned home and, through my lawyer, sent a copy of my medical statement to the Committee. Immediately they moved to suspend me pending my recovery . . . .
>
> I am feeling better and have secured the services of Marvin D. Skedelsky, Esq. [to assist me with the trial].

Jury selection in Bellamy's trial began on January 6, 1987. Although Skedelsky told Guran that he would be available to assist Guran at trial, Skedelsky was unexpectedly occupied with another case when Bellamy's trial commenced. As a result, Guran represented Bellamy alone. At no time was Bellamy informed of Guran's disciplinary or health problems. On January 24, 1987, after approximately two weeks of trial and five days of deliberations, the jury convicted Bellamy of second degree murder and second degree criminal possession of a weapon.

On March 26, 1987, more than two months after Bellamy's conviction, the First Department—without a hearing—suspended Guran from the further practice of law. The First Department chose to suspend Guran based on his representation made over three months earlier in December 1986 that his then-existing state of health prevented him from preparing for his disciplinary hearing.

Having learned that Guran had been suspended, Bellamy, represented by pro bono counsel, moved in June 1987 pursuant to N.Y. Crim. Proc. L. § 440 (McKinney 1983) to vacate his judgment of conviction. Among other things, Bellamy claimed that he was not afforded effective representation due to Guran's alleged incapacity and his subsequent suspension on that ground. Alternatively, Bellamy requested that a hearing be held to determine Guran's competency. On July 30, 1987, Judge Gallagher denied Bellamy's § 440 motion and his request for a hearing, ruling from the bench that:

> He [Guran] did an excellent job in trying that case. I don't know of any mistakes that he made in trying the case.
>
> Further, with respect to the Appellate Division, Mr. Guran came to me before he started this case. He told me that he had a matter pending before the Appellate Division. This was with the First Department. *I called the First Department and I told them that Mr. Guran was in my court and he had a matter to try here and I asked if it was appropriate for me to permit him to try this case, and they told me that it was permissible for me to do that and that's exactly what I did and I did it at Mr. Guran's request. He knew exactly what I was doing.* . . . [S]o there's no

> impropriety with respect to Mr. Guran's conduct or how he tried the case . . . . (emphasis added).

Upon Bellamy's motion for reconsideration, the court ordered a hearing to determine the competency of trial counsel. Neither Guran nor Bellamy testified at the § 440 hearing. The principal witness at the hearing was Dr. Cohen. Dr. Cohen first testified about his authorship of the October 29, 1986 letter, written at Guran's request, that was sent to the First Department in support of Guran's efforts to secure an adjournment of the disciplinary hearing. With regard to the October letter, Dr. Cohen testified essentially that:

> [H]is opinion [in the October letter] that Guran was "virtually incapacitated" related primarily to his patient's inability to travel frequently between his home in Florida and New York, as he understood would be required to participate in the disciplinary hearing. As the doctor explained, Guran's ailments gave him a poor sense of balance and made him susceptible to falls. Frequent travel heightened this risk. . . . He explained that the inability to concentrate noted in his letter related primarily to difficulty he perceived Guran would have focusing on other matters if he were in a situation where it was difficult for him to keep his balance.

Bellamy v. Cogdell, No. 90-4245 (E.D.N.Y. June 28, 1991). Significantly, based on a follow-up examination conducted on January 6, 1987—the day Bellamy's trial commenced and over two months after the October letter was written—Dr. Cohen further testified that he placed no restrictions on Guran's practice of law and, more importantly, stated unequivocally that Guran's physical problems had no effect on his mental capacities, *i.e.*, there was

nothing wrong mentally with Guran at the time of Bellamy's trial. After the evidentiary hearing, the trial court again denied Bellamy's motion to vacate his conviction, finding that at the time of trial, Guran "was mentally and physically capable to try the defendant's case and did so in a competent manner." *People v. Bellamy*, Ind. No. 5382-85 (Queens Co. Sup. Ct. Jan. 31, 1989).

The Appellate Division denied Bellamy's petition for leave to appeal from the trial court's denial of his § 440 motion. *People v. Bellamy*, Ind. No. 5382-85 (2d Dep't May 9, 1989). Thereafter, the Appellate Division affirmed Bellamy's conviction on the merits and, in the course of the opinion, rejected his argument that he was entitled to an appeal as of right from the denial of his § 440 motion. *People v. Bellamy*, 554 N.Y.S.2d 320, 321 (2d Dep't 1990). The Court of Appeals summarily denied Bellamy's petition for leave to appeal the affirmance of his conviction. *People v. Bellamy*, 76 N.Y.2d 784 (1990).

After exhausting state court remedies, Bellamy filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York reiterating the arguments raised in his § 440 motion, including the claim that he was denied effective assistance of counsel under a *per se* rule or under the actual prejudice standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Bellamy also claimed that he was denied a full and fair opportunity at the state court hearing to litigate the issue of Guran's competence, or, consequently, the issue of actual prejudice, because the court declined his request to compel Guran's attendance at the hearing.

After submission of legal memoranda, the district court rejected these claims and denied and dismissed Bellamy's habeas corpus petition without an evidentiary hearing. In

a well-reasoned opinion, the court held that the *per se* rule did not apply under the facts of this case and that Guran's representation was not deficient under the *Strickland* standard. The district court further concluded that although Guran did not testify, the testimony of Guran's treating physician concerning Guran's mental competence and the favorable observations of the trial judge regarding Guran's overall mental acuity and physical vigor during almost three weeks of trial were adequate to determine Guran's competency. The court therefore determined that another hearing on the issue of Guran's competence, or on whether Bellamy was prejudiced by Guran's representation, was unnecessary, particularly in light of Bellamy's "fail[ure] to set forth with any particularity what further evidence would have been adduced had Guran testified that would have undermined the factual findings of competency." After thoroughly reviewing the record, the district court, agreeing with the trial court, found that there was "no evidence . . . of any mental infirmity" of Guran at the time of trial that impeded his ability to present a defense, and that Guran in fact conducted a vigorous defense.

Bellamy, again represented by pro bono counsel, appealed to this court, reiterating the claims made to the district court. A divided panel reversed the district court, holding that on the facts of this case, Bellamy suffered a *per se* denial of his Sixth Amendment right to counsel. 952 F.2d 626 (2d Cir. 1991). A majority of the active judges of the court then voted to grant the State's petition to rehear the case *in banc*.

DISCUSSION

The principal issue on appeal is whether under the facts of this case Bellamy suffered a *per se* denial of his Sixth Amendment right to counsel. In the ordinary case, a defendant raising a claim of ineffective assistance of counsel bears the heavy burden of establishing that his "counsel's representation fell below an objective standard of reasonableness" and that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. However, in certain Sixth Amendment contexts involving the "[a]ctual or constructive denial of the assistance of counsel," prejudice is presumed. *Id.* at 692.

This court has found such *per se* violations in two limited circumstances: where, unknown to the defendant, his or her counsel was, at the time of trial (1) not duly licensed to practice law because of a failure ever to meet the substantive requirements for the practice of law, *see United States v. Novak*, 903 F.2d 883, 890 (2d Cir. 1990) (counsel fraudulently procured license by misrepresenting that he was entitled to a special dispensation from the bar examination); *Solina v. United States*, 709 F.2d 160, 167 (2d Cir. 1983) (counsel repeatedly failed the bar exam and was not a member of any bar) or (2) implicated in the defendant's crimes, *see United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984). Even on these occasions, we have applied the *per se* rule "without enthusiasm." *United States v. Aiello*, 900 F.2d 528, 532 (2d Cir. 1990).

We have advanced two rationales for applying the *per se* rule. The first is "jurisdictional" and applies in cases where the attorney is not duly licensed at the time of trial. It stems from the Supreme Court's decision in *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938), that the failure to pro-

vide a criminal defendant with counsel created "a jurisdictional bar to a valid conviction." *See Solina*, 709 F.2d at 168-69 (discerning no meaningful distinction between total absence of representation and representation by unlicensed counsel). The second rationale is based on notions of conflict of interest, and applies in cases both where the lawyer is not duly licensed, *see Novak*, 903 F.2d at 890; *Solina*, 709 F.2d at 164, and where the lawyer is implicated in the crimes of his or her client, *see Cancilla*, 725 F.2d at 870. In these circumstances, the defense is necessarily compromised because the advocate ordinarily "cannot be wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his [or her] background and discover his [or her] lack of credentials[,]" *Solina*, 709 F.2d at 164, or own wrongdoing. Regardless of the facts presented, application of the *per se* rule must be justified under one or both of these rationales. *See Aiello*, 900 F.2d at 532.

Against this backdrop, we turn to the merits of Bellamy's claim. Relying primarily on *Novak*, Bellamy contends that this case falls within the narrow confines of our *per se* rule. In *Novak*, we found a *per se* violation of defendant's Sixth Amendment right to counsel where counsel had secured admission to the bar by fraudulently misrepresenting to the state that he was eligible for a special dispensation from taking the bar exam. We reasoned that this fraud resulted in a substantive defect in licensure because "there has been no foundation for an assumption that defense counsel had the legal skills necessary to permit him to become a 'duly admitted' member of the bar." 903 F.2d at 890. Moreover, because of the attorney's deliberate fraud in obtaining admission, "[t]here remained the underlying risk that a vigorous defense could have led

to a deeper probe and a discovery that [the attorney] had not been 'duly' admitted." *Id.*

Analogizing this case to *Novak*, Bellamy argues that Guran did not *secure*, but *retained* his license to practice law by misrepresenting that he would not try Bellamy's case alone. According to Bellamy, Guran almost certainly would have been suspended before trial but for this misrepresentation. Bellamy further argues that Guran was prevented from defending Bellamy vigorously for fear that his unfulfilled promise to the Appellate Division to secure co-counsel would have been discovered. Bellamy's arguments are unpersuasive.

Unlike the attorney in *Novak*, who was never duly admitted to the bar and certainly, not hypothetically, would not have been admitted without his fraudulent misrepresentation, Guran was fully, not conditionally, admitted to practice for almost fifty years at the time of Bellamy's trial and there is no basis to recast reality and treat him as if he were not. Moreover, it is unclear what effect, if any, Guran's representation had on the timing of his suspension by the Appellate Division. Not only did the Appellate Division never respond to Guran's affidavit, but Guran was not suspended until over two months after Bellamy's trial, and his suspension was prospective.

In addition, Guran's unfulfilled representation to the First Department regarding co-counsel does not approach the type of intentionally fraudulent behavior present in *Novak*. The record indicates that Guran spoke to Attorney Skedelsky on more than one occasion regarding possible collaboration at Bellamy's trial and that Skedelsky promised Guran that he would be available. Unfortunately, when Guran called for his assistance, Skedelsky was unexpectedly occupied as a result of a last minute

scheduling conflict and Guran tried the case alone. Thus, there is no record evidence that Guran intentionally misrepresented that he would secure co-counsel.

Furthermore, although the record is not clear regarding whether Guran informed the trial judge of his promise to the Appellate Division to secure co-counsel, the record plainly reveals that Guran informed the court of his pending disciplinary hearing, of his possible immediate suspension for health reasons, and of his intended collaboration with Attorney Skedelsky. Indeed, at Guran's request, the trial judge contacted the Appellate Division shortly before trial to inquire whether Guran could represent Bellamy at trial and was told that he could. The judge also obviously knew that Guran represented Bellamy alone. Under these circumstances, it cannot be said that Guran's conduct approached the egregious deceptive behavior of counsel in *Novak*, *Solina*, or *Cancilla*, who in no way apprised the court that they were, respectively, unlicensed or implicated in their client's wrongdoing. *See Aiello*, 900 F.2d at 531 (refusing to extend *per se* rule " 'beyond the sort of egregious conduct present in *Solina* and *Cancilla*.' ") (citation omitted).

For similar reasons, it cannot be said that Guran was prevented from mounting a robust defense because he had something to hide. The petition to suspend Guran pending in the First Department at the time of Bellamy's trial was based on Guran's alleged ill health, not on any promise to secure co-counsel. As discussed above, Guran informed the court of his situation. Compared to counsel in *Novak*, *Solina*, and *Cancilla*, Guran had no skeletons in his closet giving rise to a conflict of interest that would have inhibited him from defending Bellamy vigorously. Indeed, the record indisputably reflects that Guran provided vigorous, competent advocacy on Bellamy's behalf.

Bellamy further contends that statements of mental incapacity made by Guran to the First Department in connection with his efforts to postpone his disciplinary hearing provide an alternative basis upon which to apply the *per se* rule. This contention is unavailing as a matter of policy and on the facts of this case.

As the Supreme Court has recently observed, "[*p*]*er se* rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman v. Thompson*, 111 S. Ct. 2546, 2558 (1991). Unlike the situation presented by the "phony" attorneys in *Novak* and *Solina*, or by the attorney involved in his client's crimes in *Cancilla*, there is simply nothing inherent in an attorney's illness that necessarily will impede a spirited defense "most of the time" to justify finding the attorney's representation *per se* ineffective. Rather, given the varying effects health problems can have on an individual's ability to function, claims of ineffective assistance based on attorney illness are best suited to the fact-specific prejudice inquiry mandated by *Strickland*.

Furthermore, in the instant case, a § 440 hearing was held specifically to probe the issue of Guran's competence to represent Bellamy in order to resolve Bellamy's claim that he was denied effective assistance of counsel because of Guran's ill health. The evidence adduced at the hearing through the testimony of Guran's physician—based on an examination of Guran the day Bellamy's trial commenced—clearly demonstrated that Guran had no mental incapacity at the time of trial. This medical evidence was consistent with the trial judge's own favorable observations of Guran's mental and physical condition during the

almost three week trial. Although Guran did not testify at the § 440 hearing, the testimony of Guran's physician, which was subject to extensive cross-examination, together with the testimony of lay witnesses Skedelsky, Victor Knapp (another attorney whom Guran approached on one occasion regarding possible collaboration) and Bellamy's mother, afforded Bellamy a full and fair opportunity to litigate the issue of Guran's competence. Given the evidence, Guran's testimony would have been of little value.

After the hearing, the state court found that at the time of trial, Guran "was mentally and physically capable to try the defendant's case and did so in a competent manner." Following a careful review of the record, the district court concluded that the state court's finding was amply supported by the evidence.

Because Bellamy had a full, fair, and adequate § 440 hearing, and because the district court concluded that the state court's factual determination regarding Guran's competence was supported by the record, the district court properly deferred to the state court's factual finding, *see* 28 U.S.C. § 2254(d); *Sumner v. Mata*, 455 U.S. 591, 598 (1982) (per curiam) (§ 2254(d) "requires the federal courts to show a high measure of deference to the factfindings made by the state courts."); *Ventura v. Meachum*, 957 F.2d 1048, 1054 (2d Cir. 1992), and was well within its discretion not to hold an evidentiary hearing on this same issue. *See, e.g., Townsend v. Sain*, 372 U.S. 293, 318 (1963), *overruled on other grounds, Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992); *Tate v. Wood*, 963 F.2d 20, 24 (2d Cir. 1992). Under these circumstances, Bellamy's reliance on Guran's alleged incapacity as a ground for applying the *per se* rule is, as a factual matter, unwarranted.

Having concluded that this case does not fall within the ambit of our Sixth Amendment *per se* jurisprudence, we need not address any issues that would be presented by a contrary ruling on the merits. We note that a contrary ruling would arguably constitute a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny.

CONCLUSION

We have considered the remaining claims advanced by Bellamy in support of his petition for a writ of habeas corpus and find them to be without merit. Based on the foregoing, the opinion of the panel is vacated and the judgment of the district court denying and dismissing Bellamy's petition for a writ of habeas corpus is affirmed.

FEINBERG, Circuit Judge (with whom Oakes, Newman, Kearse, Cardamone and Winter, Circuit Judges, join), dissenting:

I respectfully dissent. This case should never have been subjected to an in banc hearing. And now that it has been, the majority has reached a result that is inconsistent with our precedents.

Misuse of the in banc procedure

Rule 35(a) of the Federal Rules of Appellate Procedure provides that:

> (a) **When Hearing or Rehearing in Banc Will be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or

> other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Thus, the Rule cautions that in bancs are "not favored" and "ordinarily will not be ordered except . . . to secure or maintain uniformity" or unless the case raises "a question of exceptional importance." Neither condition has been met here.

An in banc proceeding was not necessary to secure or maintain uniformity, a requirement obviously intended to prevent panels from overruling earlier decisions unless a majority of the court agrees. See United States v. Valencia, 669 F.2d 37, 38 (2d Cir. 1981) (Van Graafeiland, J., dissenting); United States v. Aguon, 851 F.2d 1158, 1175 n.6 (9th Cir. 1988) (Reinhardt, J., concurring), overruled on other grounds, Evans v. United States, 112 S. Ct. 1881 (1992). Bellamy's lawyer, Sidney Guran, was faced with the immediate loss of his license—well before Bellamy's trial—because of Guran's own admission to the Appellate Division of incapacity; Guran was allowed to keep his license long enough to try the case only because of a representation that he did not fulfill. The panel that first heard this appeal held that under our precedents in United States v. Novak, 903 F.2d 883 (2d Cir. 1990); United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984); and Solina v. United States, 709 F.2d 160 (2d Cir. 1983), Bellamy thereby suffered a per se denial of his Sixth Amendment right to counsel. Bellamy v. Cogdell, 952 F.2d 626 (2d Cir. 1991). Obviously, the panel did not attempt to overrule the earlier cases so there is no need for an in banc to

secure or maintain uniformity. We have here merely a dispute among the judges of the court as to whether our per se rule does or does not "apply to the facts of this case," as the majority puts it. Such a disagreement does not justify an in banc. See In re Drexel Burnham Lambert Inc., 869 F.2d 116, 118 (2d Cir. 1989) (Miner, J., concurring) (finding standard for in banc review not met when "the panel majority has applied well-settled rules to the specific facts of [the] case" in reaching its decision), cert. denied, 490 U.S. 1102 (1989).

Moreover, much of the difference between the majority and minority involves a resolution of a factual issue that is in no sense appropriate for in banc consideration. The majority finds that Guran had a firm commitment from another lawyer (Marvin D. Skedelsky) to assist him at trial and that Skedelsky was "unexpectedly" unavailable. As stated below, we find no evidence in the record of such a firm commitment by Skedelsky or even of his knowledge of the trial date until the very eve of trial.

Nor does this appeal raise "a question of exceptional importance." There is nothing about the case itself that is exceptionally important unless one takes the position that *any* grant of a writ of habeas corpus is exceptionally important. We have not reached that stage of in banc jurisprudence, and I hope that we never do. This case is a factual sport. I doubt if there will ever be another in which a lawyer: (a) admits mental incapacity, including inability to concentrate; (b) makes this admission to the Appellate Division; (c) promises the Appellate Division that he will get another lawyer to try a criminal case but does not fulfill the promise; (d) makes this promise in response to the Appellate Division's motion (returnable before the commencement of the trial) for the lawyer's immediate suspension; (e) would almost certainly be sus-

pended prior to the criminal trial but for the unfulfilled promise; and (f) is suspended two months after the trial without any further record being made.

In short, the facts of this case are unique and it raises no issue of "exceptional importance." Indeed, the only issues even remotely approaching that threshold are those involving the application of Teague v. Lane, 489 U.S. 288 (1989), to this habeas corpus proceeding. Those issues are whether the panel's decision in this case announced a "new rule" within the meaning of *Teague*, and if so, whether respondent-appellee waived any arguments based upon *Teague* by raising them for the first time in a petition for rehearing after the panel had ruled. The in banc court specifically invited briefing on those issues but the majority does not address them.

In sum, the in banc proceeding here was not required either to maintain uniformity or to decide an issue of exceptional importance. It is clear that the in banc majority simply does not like the result of the panel decision. But an in banc for that reason is contrary to the spirit of FRAP 35. Such misuse of the in banc procedure bodes ill for a court whose filings soared above 4,000 for the first time and whose backlog, despite the devoted efforts of all the judges of the court, rose significantly in the statistical year that ended on June 30, 1992. In the face of such a caseload, the waste of time and effort caused by unnecessary in bancs cannot be justified. See Jon O. Newman, In Banc Practice in the Second Circuit: The Virtues of Restraint, 50 Brook. L. Rev. 365, 382 (1984); Jon O. Newman, In Banc Practice in the Second Circuit, 1984-1988, 55 Brook. L. Rev. 355, 369 (1989).

The merits of the appeal

Turning to the merits of the appeal, under most circumstances, when a criminal defendant raises a claim of ineffective assistance of counsel, the defendant must demonstrate both unreasonable representation by the attorney and sufficient prejudice to render the result of the trial unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984). In a small class of cases, however, we do not apply *Strickland*'s two-pronged test of ineffective assistance but instead presume that there has been prejudice. The Supreme Court in *Strickland* spoke of such cases when it asserted that "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." 466 U.S. at 692.

Both before and after *Strickland*, we have applied such a presumption in unusual circumstances and held that a defendant had been denied the constitutional right to counsel. In *Solina*, defendant's counsel had never been admitted to practice. In a typically thorough opinion by Judge Friendly, we applied a per se rule even though the representative was trained in law and apparently furnished reasonably competent representation and the evidence against the defendant was so overwhelming that he would almost certainly have been convicted regardless of who had represented him. We held that a defendant's Sixth Amendment right to counsel is violated where, without the defendant's knowledge, "his representative was not authorized to practice law in any state, and the lack of such authorization stemmed from failure to seek it or from its denial for a reason going to legal ability, such as failure to pass a bar examination, or want of moral character." 709 F.2d at 167 (citation omitted). We there concluded that "[a]pplication of a *per se* rule appears to

us to be required in a case like this by the teachings of the Supreme Court . . . ." 709 F.2d at 168. We were careful to point out, however, that we did not intimate that simply any technical defect in the licensed status of a defendant's representative would amount to a violation of the Sixth Amendment, 709 F.2d at 167, and we gave several examples.

We next applied a per se rule in *Cancilla*. In that case, the attorney at issue had apparently been licensed, but, unknown to the defendant, had participated in criminal conduct related to the conduct for which defendant was convicted. Despite the lack of proof of prejudice to the defendant, we held there that such participation created a conflict of interest that denied defendant his right to counsel at trial. The reason we presumed prejudice in that instance was that the conflict may have prevented the attorney from vigorously representing the client, for fear of being discovered. Cancilla, 725 F.2d at 870. As will be seen below, on the facts of this case we have no less—and perhaps more—reason to fear inadequate representation.

Two years ago, in *Novak*, we again thoroughly canvassed the subject. The attorney in that case (Joel B. Steinberg), although licensed to practice law during the defendant's trial, had fraudulently obtained his license. In an opinion by Judge Kearse, we reaffirmed the holding in *Solina* and held that the representation at trial constituted per se ineffective assistance of counsel, lack of prejudice notwithstanding. Our reasoning again was that "mere technical defects need not result in *per se* Sixth Amendment violations" but that "serious substantive defects" do. 903 F.2d at 888. We pointed out that in *Solina* there had been "a demonstrated inability to meet the threshold criteria of competence in the law (as in Solina's counsel's failure of the bar examination) . . . ." Id. Similarly, in

Novak, "[t]he defect in Steinberg's licensure was not simply technical but was instead serious and substantive. At the time of his admission to the bar, Steinberg had not met the State's normal substantive requirements for admission to the New York State Bar. His competence to practice law had never been tested, and he was not entitled to bypass such testing." 903 F.2d at 890.

Our per se rule concerning Sixth Amendment violations is not a rule rooted in the facts of any particular case. As the author of the majority opinion in this case pointed out in United States v. Aiello, 900 F.2d 528 (2d Cir. 1990), it is a rule applicable whenever a lawyer's relationship with the licensing authorities is such that he is inhibited from conducting a vigorous defense " 'wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his background and discover his lack of credentials.' " Id. at 531 (quoting Solina, 709 F.2d at 164). As we emphasized in *Aiello*, we do not "limit the *per se* rule exclusively to the precise fact situations found in *Solina* and *Cancilla*. Rather, lest our standards undercut the sensitive relationship between attorney and client, *we repudiate a rigid approach in favor of a consideration of the facts of each case*." 900 F.2d at 532 (emphasis added).

The facts of this case call for application of our per se rule. Accepting the majority's statement of facts and supplementing it in some respects based upon the record, I think it is clear that because Guran did not have funds to hire other counsel, he made material misrepresentations and omissions that led to his avoiding a suspension and being allowed to try this case by himself. First, he promised the Appellate Division on December 12, 1986, that "of course" he would not try Bellamy's case alone, that he would obtain another attorney to try the case and

that he would merely assist that attorney. However, at the time this commitment was made, Guran conceded that he had spent the retainer Bellamy's mother had paid. Thus, how Guran was going to pay to hire other counsel was unclear, which bears on the sincerity of his promise.

In a handwritten letter the day before, Guran had informed the trial judge that he had secured the services of Skedelsky to assist him at trial. However, the letter strongly implied that Guran—not Skedelsky—would be the lead counsel, contrary to the representation Guran made the very next day to the Appellate Division. Moreover, Guran did little to carry out his promise to get Skedelsky to help him, either as "second seat" or as lead counsel. Although Guran mentioned to Skedelsky that he "might" seek his assistance in trying the Bellamy case, Guran never actually requested such assistance until the eve of trial. Skedelsky was thus apparently never informed of the trial date until the last moment and was never asked to make a commitment to be available at a particular time. Notably, Skedelsky was never asked to engage in any preparation to try or otherwise to assist in the case. Indeed, he testified that Guran would have been lead counsel even if he, Skedelsky, had participated. This did not fulfill Guran's promise to the Appellate Division. Also notably, Guran did not ask the trial judge, whom he knew well enough to address as "Jack," to adjourn the trial to a date at which Skedelsky would be available.

The lukewarm efforts to secure a lawyer to "assist" were the result of the fact that Guran, who conceded that he could not repay the retainer if he was unable to try the Bellamy case, apparently did not have funds to retain other counsel. Guran knew this at the time he promised the Appellate Division that he would not try the case

alone and would merely assist another attorney, and his promise was thus misleading.

Guran was equally misleading in his dealings with the trial judge. Guran's handwritten letter to the judge did not disclose that his own lawyer had asserted Guran's lack of competence to participate in his own disciplinary proceedings or that Guran would promise the Appellate Division the very next day to obtain other counsel to try the case. And there is nothing in the record to suggest that Guran otherwise informed the judge of these facts. On this record, the call by the trial judge to the Appellate Division would have evoked only an inquiry into whether Guran was still in good standing and would not have triggered a review of the entire file, which would have exposed Guran's misrepresentations.

We note that it is undisputed that at the time of trial, Bellamy knew nothing about the charges against Guran, Guran's admission of incapacity or Guran's representation that he would not attempt to try the case alone. Bellamy has sworn in an affidavit that he would not have allowed Guran to represent him at trial had he known of the facts stated above, and that contention is not disputed. Indeed, according to the affidavit, Bellamy got his first inkling of Guran's situation only at sentencing on April 8, 1987, when the trial judge would not allow Guran to represent Bellamy due to Guran's suspension on March 26.

Contrary to the majority's claim that it is "unclear" what effect Guran's misrepresentations had on his suspension, the only reasonable inference is that the Appellate Division would have suspended Guran immediately or prevented him from trying Bellamy's case if it had known he would not be honoring his promise. Guran admitted his incompetence and falsely promised to take

preventive actions for the express purpose of avoiding a suspension. Without making full disclosure, he prevailed upon the trial court to allow him to try the case. It is unrealistic to assume that Guran's course of conduct did not bring about the desired result, i.e., no suspension and no need to hire another attorney as lead counsel.

I thus believe that this case is governed by our prior decisions. First, we have previously applied a per se rule where a lawyer is not licensed (*Solina*) and where the lawyer obtains a license through misrepresentation (*Novak*). In this case, a lawyer, who had admitted that he did not have the mental capacity to defend himself, avoided immediate suspension and thereby retained his authority to defend someone else only by a promise to the Appellate Division that ultimately went unfulfilled. Had there been no such misrepresentation, Guran's suspension would have taken place before Bellamy's trial and Guran could not have defended him.

Second, can it be doubted that any lawyer (assuming his mind is indeed unimpaired) would not be inhibited in putting on a vigorous defense by a reluctance to have the judge or the prosecutor find out that he was trying the case alone in violation of his promise to the Appellate Division to act only to assist another attorney, a promise given to forestall a suspension order? The inhibition upon Guran arising from fear of disclosure of the true facts was every bit as strong as it is in a case where the lawyer is not licensed at all. Perhaps it was stronger: the unlicensed lawyer fears losing a status he only claims but does not enjoy; on these unique facts, Guran was in jeopardy of losing his duly licensed right to practice, a consequence that in fact befell him once the facts were known.

Even if there has not been a per se violation of the Sixth Amendment, the case should at least be remanded to allow the district court to conduct a hearing under *Strickland*. The state court's failure to permit Bellamy to call Guran as a witness deprived Bellamy of a fair opportunity to develop the record as to the effectiveness of his counsel. The majority makes much of the state court hearing at which Skedelsky, Victor Knapp (another attorney whom Guran approached regarding possible collaboration), Guran's physician and Bellamy's mother testified and concludes that given this evidence "Guran's testimony would have been of little value." This observation appears to assume the content of Guran's testimony. Moreover, not one of these witnesses could possibly know the answers to the key questions: Did Guran fear that aggressive conduct of the defense might disclose to the prosecutor and the state courts his breach of his promise not to try the case alone, and, if so, did such fear affect his conduct of the defense? Were Guran's half-hearted attempts to obtain the aid of another counsel limited by his financial resources? Was Skedelsky's inability to assist at trial "unexpected to Guran?" Guran might well deny fear of disclosure (or any consequences of it), but Bellamy had a right to question him. It would then be up to the court as finder of fact to assess the credibility of any such denials.

Conclusion

I would therefore reverse the judgment of the district court, as the panel did. At the very least, I would remand for a *Strickland* hearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 438—August Term 1991

Argued: October 30, 1991 Decided: December 18, 1991

Docket No. 91-2327

PERRY BELLAMY,

Petitioner-Appellant,

—against—

WILLIAM COGDELL,
Warden Brooklyn House of Detention,

Respondent-Appellee.

Before:

OAKES, *Chief Judge,*
FEINBERG and ALTIMARI, *Circuit Judges.*

Appeal from decision and order denying habeas corpus relief by the United States District Court for the Eastern District of New York, Reena Raggi, J. Appellant contends that the district court erred in failing to find constitutional defect in, among other things, his attorney's representa-

tion at trial. Reversed with instructions. Judge Altimari dissents in a separate opinion.

MICHAEL A. CIAFFA, Mineola, NY (Meyer, Suozzi English & Klein, P.C., of Counsel), *for Petitioner-Appellant.*

SEYMOUR ROTH, Kew Gardens, NY, Assistant District Attorney for Queens County (Richard A. Brown, District Attorney for Queens County, of Counsel), *for Respondent-Appellee.*

FEINBERG, *Circuit Judge*:

Petitioner Perry Bellamy appeals from a decision and order of the United States District Court for the Eastern District of New York, Reena Raggi, J., denying his application for a writ of habeas corpus and granting judgment to respondent William Cogdell, Warden of the Brooklyn House of Detention. In his application for the writ, Bellamy claimed ineffective assistance of trial counsel and denial of due process. To this he added a claim that he was denied a full and fair opportunity to litigate his attorney's competence in his state-court hearing. We hold that on the unusual facts before us and under our precedents, this is one of those rare instances where denial of effective counsel must be presumed as a matter of law, without any showing of prejudice. Therefore, we reverse the denial of the writ of habeas corpus and remand with instructions.

In January 1987, Perry Bellamy went on trial in New York Supreme Court, Queens County, for the murder of New York State Parole Officer Brian Rooney. One year earlier, Mr. Bellamy's mother had retained Sidney J. Guran to defend her son. At that time, Guran had been retired for over a year and, as later became evident, was ill.

As the trial date approached, Guran's health declined. In September 1986, his doctor, Richard P. Cohen, M.D., undertook an extensive evaluation of a neurological problem from which Guran was suffering, a condition known as polyneuropathy and "characterized by peripheral motor weakness, unsteadiness on his feet and, at times, an inability to concentrate." In an apparently unrelated development, on October 20, 1986, the chief counsel to the Departmental Disciplinary Committee for the First Judicial Department (the Committee) filed charges of professional misconduct involving conversion of funds against Guran. Less than a month later, the Committee received a letter from Guran's attorney, Richard L. Baltimore, stating that Guran "is not mentally capable of preparing for the hearing" on the charges and requesting an adjournment of the hearing on that basis. Baltimore added that in his telephone conversations with Guran, he perceived "a certain amount of disorientation.

Enclosed with Baltimore's letter was a letter from Dr. Cohen, Guran's physician, dated October 29, 1986, indicating that evaluation and treatment of Guran's current medical problem would take "at least three to six months" and that "Mr. Guran will be effectively incapacitated during that time." Based on these statements in support of Guran's request for an adjournment, on

November 21, 1986 the Committee petitioned the Appellate Division, First Department, for Guran's indefinite suspension, and simultaneously moved for an order "suspending respondent [Guran] from the practice of law, effective *immediately* . . . ." (emphasis added). The return date of the motion was December 23, 1986.

Guran answered this motion in an affidavit sworn to on December 12, 1986, in which he admitted that the factual allegations of the petition "are not in dispute." These included allegations of physical and mental incapacity. The affidavit stated that he had "not taken any new work" since his 70th birthday in 1984 other than Bellamy's case, which was set for trial early in the following month. He pointed out that the trial could not be delayed, that he was familiar with the case, that Bellamy's mother had already paid him and that Bellamy "strictly trusts only me." For these reasons, Guran requested that he not be suspended and stated that "I, of course, will not attempt to try this case by myself. I will have a competent attorney, but I must be present to assist him." He also indicated that he would not take any other cases.

Guran subsequently wrote to the trial judge, John T. Gallagher, J., advising him generally of the disciplinary charges against Guran, his explanation of his actions in the matters charged, his request for an adjournment of the hearing on those charges, the Committee's motion to suspend him immediately and his intentions to enlist the help of another attorney at Bellamy's trial.

It is undisputed that at the time of trial, Bellamy knew nothing about the charges against his attorney, his attorney's admission of incapacity or his attorney's representation that he would not attempt to try the case alone. Bellamy has sworn in an affidavit that he would not have

allowed Guran to represent him at trial had he known of the facts stated above, and that contention is not disputed. Also undisputed is the fact that Guran, alone, represented Bellamy during the trial after making unsuccessful attempts to have another attorney assist him. The trial commenced with jury selection on January 6, 1987 and ended with a jury verdict of murder in the second degree and criminal possession of a weapon on January 24, 1987.

Approximately two months after the jury verdict, on March 26, 1987, the Appellate Division, First Department, issued a unanimous order "to protect the public," suspending Guran indefinitely as an attorney on the ground that, as Guran himself had implicitly conceded, "he is, at this time, incapable of practicing law." At a sentencing proceeding in April 1987, after Bellamy had learned of Guran's suspension, Bellamy protested that his rights were "being violated . . . . Mr. Guran was not a fit lawyer to handle and represent me properly because of his medical health and other reasons." Bellamy added "[u]nder the Fourteenth Amendment, I have a right to counsel and I have a right to a fair trial . . . . [b]ut I did not have that." He was subsequently sentenced to 15 years to life in prison for the murder conviction and five to 15 years in prison for the criminal weapon possession conviction.

Represented by pro bono counsel, Bellamy moved in June 1987, pursuant to CPL § 440, for an order setting aside his conviction on the grounds that he was not afforded effective assistance of counsel and was denied due process of law. On July 30, 1987, Justice Gallagher denied the motion summarily after oral argument. However, after Bellamy's request for reconsideration, the judge vacated his denial and set the matter down for a hearing. Before the hearing was held, Justice Gallagher

denied Bellamy's motion to compel Guran's testimony at the hearing.

The hearing took place on three separate days in 1988; several witnesses testified, including Guran's doctor. Thereafter, in a memorandum decision dated January 31, 1989, Justice Gallagher denied Bellamy's motion to vacate his conviction. Justice Gallagher concluded that Guran was "mentally and physically capable to try the defendant's case and did so in a competent manner." The judge also held that it had not been necessary at trial either to inquire as to whether Bellamy "was aware his attorney was facing suspension on grounds of incapacity" or to require Guran to obtain assistance in trying the case. Justice Gallagher finally concluded that Bellamy was not denied effective representation during the suppression hearing.

Bellamy duly sought permission to appeal the denial of his CPL § 440 motion; in May 1989, the Appellate Division denied leave to appeal.

In December 1990, Bellamy filed his petition in the Eastern District for a writ of habeas corpus. He raised in the district court the same issues presented earlier in state court in the CPL § 440 motion, and added that he had not had a full and fair opportunity to develop his claims because Justice Gallagher had denied his motion to compel Guran's testimony at the earlier hearing.

After submission of legal memoranda, the district court denied the petition on the merits in June 1991 without an evidentiary hearing. In a reasoned and thorough opinion, Judge Raggi ruled that Bellamy had exhausted his state court remedies, that Bellamy had not been denied effective assistance of counsel, under a per se rule or under the standard set forth in Strickland v. Washington, 466 U.S.

668 (1984), and that the state trial judge's failure to take action or make inquiry after learning of the pending motion to suspend Guran did not deprive Bellamy of due process. This appeal followed.

Discussion

We turn directly to consideration of the merits, since the district court was justified in holding that state remedies have been exhausted, and appellee Warden makes no claim to the contrary.

Under most circumstances, when a criminal defendant raises a claim of ineffective assistance of counsel, the defendant must demonstrate both unreasonable representation by the attorney and sufficient prejudice to render the result of the trial unreliable. Strickland, 466 U.S. at 687. In a small class of cases, however, we do not apply *Strickland*'s two-pronged test of ineffective assistance but instead presume that there has been prejudice. The Supreme Court in *Strickland* spoke of such cases when it asserted that "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." 466 U.S. at 692.

Both before and since *Strickland*, we have held that where a defendant was represented by an attorney who, unbeknown to the defendant, was not licensed to practice law, that defendant has been denied the constitutional right to counsel. In Solina v. United States, 709 F.2d 160 (2d Cir. 1983), in a typically thorough opinion by Judge Friendly, we so held even where the representative was trained in law, where the representative apparently furnished reasonably competent representation and where

the evidence against the defendant was so overwhelming that he would almost certainly have been convicted regardless of who had represented him. We held that a defendant's Sixth Amendment right to counsel is violated where, without the defendant's knowledge, "his representative was not authorized to practice law in any state, and the lack of such authorization stemmed from failure to seek it or from its denial for a reason going to legal ability, such as failure to pass a bar examination, or want of moral character . . . ." 709 F.2d at 167. We there concluded that "[a]pplication of a *per se* rule appears to us to be required in a case like this by the teachings of the Supreme Court . . . ." 709 F.2d at 168. We were careful to point out, however, that we did not intimate that simply any technical defect in the licensed status of a defendant's representative would amount to a violation of the Sixth Amendment, 709 F.2d at 167, and we gave several examples.

Seven years later, in United States v. Novak, 903 F.2d 883 (2d Cir. 1990), we again thoroughly canvassed the subject. The attorney in that case (Joel B. Steinberg), although licensed to practice law during the defendant's trial, had fraudulently obtained his license. In an opinion by Judge Kearse, we reaffirmed the holding in *Solina* and held that the representation at trial constituted per se ineffective assistance of counsel, lack of prejudice notwithstanding. Our reasoning again was that "mere technical defects need not result in *per se* Sixth Amendment violations" but that "serious substantive defects" do. 903 F.2d at 888. We pointed out that in *Solina* there had been "a demonstrated inability to meet the threshold criteria of competence in the law (as in Solina's counsel's failure of the bar examination) . . . ." Id. Similarly, in *Novak*, "[t]he defect in Steinberg's licensure was not simply tech-

nical but was instead serious and substantive. At the time of his admission to the bar, Steinberg had not met the State's normal substantive requirements for admission to the New York State Bar. His competence to practice law had never been tested, and he was not entitled to bypass such testing." 903 F.2d at 890.

In the case before us, the attorney whose assistance is at issue, Mr. Guran, has been suspended indefinitely from the practice of law. Disciplinary proceedings started in October 1986, and a hearing on those charges was noticed for December 11, 1986. In November, Guran's attorney sent a letter to the Departmental Disciplinary Committee, stating that Guran was "not mentally capable of preparing for the hearing" and requesting an adjournment on that basis. The Committee quickly moved for an order *immediately* suspending Guran from practicing law and noticed a return date prior to the date when Bellamy's trial would begin. In response to that motion, in an affidavit sworn to only about three weeks before the scheduled commencement of the trial, Guran admitted that the factual allegations of incapacity were not in dispute and swore to the Appellate Division that he would "of course" not try Bellamy's case alone. Guran substantially repeated this promise to Justice Gallagher in a letter. When Guran was finally suspended after the trial, the ground for suspension was that by his own implicit concession, "he is, at this time, incapable of practicing law." We think it is clear that but for the promise to the Appellate Division to secure the help of a competent attorney—a promise that Guran did not or could not keep and that he did not convey to the trial judge—Guran's suspension would almost certainly have taken place prior to Bellamy's trial. It was only by a representation that was not fulfilled that the attorney in this case remained licensed for the duration of the trial.

We have also applied a per se rule in United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984). In that case, the attorney at issue had, unknown to the defendant, participated in criminal conduct related to the conduct for which defendant was convicted. Despite the lack of proof of prejudice to the defendant, we held there that such participation created a conflict of interest that denied defendant his right to counsel at trial. We agree with respondent Warden that the present case does not raise a similar conflict of interest problem. However, a per se denial of effective assistance does not arise only where there is a conflict of interest between an attorney and client. On the contrary, the reason we presume prejudice in such instances is that the conflict may prevent the attorney from vigorously representing the client, for fear of being discovered. Cancilla, 725 F.2d at 870. We have no less—and perhaps more—reason to fear inadequate representation where the attorney is, as Guran has conceded himself to be, mentally incapable of preparing for a simple disciplinary hearing than we would be if there were a conflict of interest.

The Warden claims that this case resembles Waterhouse v. Rodriguez, 848 F.2d 375 (2d Cir. 1988), in which a criminal defense attorney was undergoing disciplinary proceedings while representing his client at a hearing to determine whether his client's confession was voluntary. We held that the pendency of the disciplinary proceedings, even though they ended in disbarment, did not alone trigger the presumption of prejudice. The analogy between *Waterhouse* and the present case is flawed. In *Waterhouse*, the attorney was disbarred for misappropriating client funds and for failing to represent clients after accepting fees. 848 F.2d at 378. Neither of these bases of disbarment called into question the attorney's competence

to practice law at the time he was representing Waterhouse. They were solely reflections of his honesty and his ethical entitlement to remain a member of the bar. As we stated there, "the charges underlying his disbarment were unrelated to his representation of Waterhouse . . . ." 848 F.2d at 383. It was therefore not considered pertinent to the defendant's representation at the confession hearing that his attorney was disbarred.

The Warden also relies on United States v. Aiello, 900 F.2d 528 (2d Cir. 1990). In that case, the attorney representing the criminal defendant was under investigation by the Organized Crime Strike Force for the Eastern District of New York before and during the proceedings against the defendant. But as in *Waterhouse*, "[the attorney's] purported crimes were totally unrelated to the . . . crimes for which [the defendant] was being tried." 900 F.2d at 531. There was similarly no evidence that the attorney was incompetent to practice law.

In our case, in contrast to both *Waterhouse* and *Aiello*, the defect which led to Guran's suspension was "a serious substantive flaw, [such as] . . . a demonstrated inability to meet the threshold criteria of competence in the law. . . ." Novak, 903 F.2d at 888. Had Guran been suspended solely for the financial charges originally brought against him, on the authority of *Waterhouse* we might well have upheld Bellamy's conviction. But when an attorney is admittedly incapable of preparing for a hearing to be held a week or two before a criminal trial, when that incapacity is the ground for suspension from practice shortly after the trial, when that suspension would almost certainly have occurred prior to the criminal trial but for an unfulfilled promise to be assisted by competent counsel during the trial, and when the attorney's client is ignorant of all of this, we feel obligated by our cases to hold on such

unusual facts that the client has been denied the effective assistance of counsel guaranteed a defendant by the Constitution.

Because we have found that there was per se ineffective assistance of counsel, we do not reach the other claims raised by appellant. The judgment of the district court is reversed and the case is remanded for a grant of the writ of habeas corpus under appropriate conditions.

ALTIMARI, *Circuit Judge*, dissenting:

The majority finds that the facts of this case constitute a *per se* violation of the Sixth Amendment right to counsel. This Circuit has found such *per se* violations in only two limited circumstances: where, unknown to the defendant, his or her counsel was, at the time of trial (1) not duly licensed to practice law because of a failure ever to meet the substantive requirements for the practice of law, *see United States v. Novak*, 903 F.2d 883, 890 (2d Cir. 1990) (counsel fraudulently procured license by misrepresenting that he was entitled to a dispensation from the bar examination); *Solina v. United States*, 709 F.2d 160, 167 (2d Cir. 1983) (counsel repeatedly failed the bar exam) or (2) implicated in the defendant's crimes. *See United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984). Even on these occasions, we have applied the *per se* rule "without enthusiam." *United States v. Aiello*, 900 F.2d 528, 531 (2d Cir. 1990).

The present case simply does not fall within the facts or underlying rationale of this narrow category of cases. Guran *was* duly licensed at the time of trial and I cannot subscribe to the majority's attempt to recast reality and

treat him as if he were not. Similarly, there is no allegation that Guran was involved in the misdeeds of Bellamy. In addition, the facts of this case, fully developed, demonstrate that at the time of trial, Guran was completely mentally competent to defend Bellamy.

Moreover, the majority implicitly concedes that Bellamy cannot establish that Guran's representation was ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Indeed, the record reflects that Guran called numerous witnesses (all well prepared to testify) and mounted a vigorous and cogent defense, highlighted by the fact that despite the overwhelming evidence against Bellamy, the jury deliberated for five days before convicting him.

Because Guran provided Bellamy constitutionally effective representation, and because the majority's application of the *per se* rule to the facts of this case is an unwarranted departure from prior decisions of this Court, I respectfully dissent.

As the majority indicates, the underlying action in this case stemmed from petitioner Perry Bellamy's participation in the brutal murder of State Parole Officer Brian Rooney. Lorenzo "Fat Cat" Nichols, a notorious Queens drug dealer, ordered Rooney's murder from Nichols' jail cell. This "hit" was a revenge killing for Rooney's role in placing Nichols behind bars. Over one year prior to the start of Bellamy's trial in January 1987 for his role in Rooney's murder, Bellamy's mother contacted Attorney Sidney Guran to represent Bellamy. Although he was retired and living in Florida, Guran had represented Bellamy several times in the past and agreed to represent him again. At that time, Guran was seventy-one years old

and had been a successful member of the bar for almost fifty years.

In the months preceding and during Bellamy's trial, Guran was the subject of disciplinary proceedings in the First Department. In October 1986, the Departmental Disciplinary Committee alleged that Guran had converted client funds in 1976 and had negligently handled a real estate transaction in 1977. The Committee scheduled a hearing on the charges for December 11, 1986. On November 10, 1986, Guran's attorney, Richard L. Baltimore, Jr., requested that the hearing be adjourned because more time was needed to compile documents for the hearing and because Guran was [then] "not mentally capable of preparing for the hearing." Baltimore based his evaluation of Guran's capacity on phone conversations with Guran in which he found "a certain amount of disorientation" and on a letter, dated October 29, 1986, from Guran's physician, Dr. Richard P. Cohen.

According to Dr. Cohen, Guran suffered from a variety of physiological ailments, including a recently diagnosed polyneuropathy, a condition "characterized by peripheral motor weakness [and] unsteadiness" on one's feet. Dr. Cohen had been treating Guran for that condition for the preceding six weeks. During that time, as a result of the "physical and emotional stress" associated with Guran's recently discovered illness and of certain medications, Guran had been "virtually incapacitated." Dr. Cohen also noted that as a result of that condition, Guran "at times" had "an inability to concentrate." The prognosis for Guran's newly discovered condition was uncertain at that time, but Dr. Cohen "anticipated" that evaluation and treatment of the polyneuropathy would take three to six months, and that Guran would be "effectively incapacitated during that time."

Based on these communications, and on the underlying charges, the Disciplinary Committee petitioned the First Department on November 21, 1986 for Guran's immediate, indefinite, suspension from the practice of law. In response, Guran submitted an affidavit to the First Department on December 12, 1986, in which he admitted his medical problems, but stated that a suspension, with its attendant stigma, was unnecessary. According to Guran, he had been essentially retired since 1984, having taken on no new work except for Bellamy's case. Because of his prior representation of Bellamy and because of his familiarity with the case, Guran requested that he be permitted to represent Bellamy, stating:

> I, of course, will not attempt to try this case by myself. I will have a competent attorney, but I must be present to assist him. Bellamy relies on and trusts only me and his mother has paid me. It would be a complete disservice to this defendant and jeopardize his right to a fair trial if I were not permitted to assist in his trial and defense.

Neither the Disciplinary Committee nor the First Department responded to Guran's affidavit.

On December 11, 1986, Guran also advised the trial judge, John T. Gallagher, in an *ex parte* submission, about the pending disciplinary charges and the motion to suspend him pending his recovery from health problems. Among other things, Guran informed Judge Gallagher:

> You might remember that I had a Dr. [sic] appointment . . . at N.Y. Hospital at which time a tentative diagnosis of [a form of polio commonly known as Lou Gehrig's Disease] was made. Needing time to prepare [for the disciplinary hearing scheduled for December 11, 1986], feeling miserable, [and] dis-

> couraged, I returned home and, through my lawyer, sent a copy of my medical statement to the Committee. Immediately they moved to suspend me pending my recovery . . . .
>
> *I am feeling better* and have secured the services of Marvin D. Skeledsky, Esq. [to assist me with the trial]. (emphasis added).

Jury selection in Bellamy's trial began on January 6, 1987. Because Skeledsky was unexpectedly occupied with another case at that time, Guran represented Bellamy alone. At no time was Bellamy informed of Guran's disciplinary or health problems. On January 24, 1987, after five days of deliberations, the jury convicted Bellamy of second degree murder and second degree criminal possession of a weapon.

On March 26, 1987, over two months after Bellamy's conviction, the First Department—without a hearing—suspended Guran from the further practice of law. The First Department chose to suspend Guran based on his December 1986 representation that he was then not mentally capable of preparing for a disciplinary hearing. The First Department determined that Guran's representation, "implicitly concedes that he is, at this time, incapable of practicing law."

Having learned that Guran had been suspended, Bellamy moved in June 1987, pursuant to N.Y. Crim. Proc. L. § 440 (McKinney 1983), to vacate his judgment of conviction based, among other things, on Guran's alleged incapacity to serve as counsel and his subsequent suspension on those grounds. Alternatively, Bellamy requested that a hearing be held to determine Guran's competency. Judge Gallagher denied Bellamy's § 440

motion and his request for a hearing, observing in pertinent part that:

> He did an excellent job in trying that case. I don't know of any mistakes that he made in trying the case.
>
> Further, with respect to the Appellate Division, Mr. Guran came to me before he started this case. He told me that he had a matter pending before the Appellate Division. This was with the First Department. *I called the First Department and I told them that Mr. Guran was in my court and he had a matter to try here and I asked if it was appropriate for me to permit him to try this case, and they told me that it was permissible for me to do that and that's exactly what I did* . . . . so there's no impropriety with respect to Mr. Guran's conduct or how he tried the case . . . . (emphasis added).

Upon Bellamy's motion for reconsideration, the court ordered a hearing to determine the competency of trial counsel. Neither Guran nor Bellamy testified at the § 440 hearing. The principal witness at the hearing was Dr. Cohen. Dr. Cohen first testified about his authorship of the October 29, 1986 letter, written at Guran's request, that was sent to the First Department in support of Guran's efforts to secure an adjournment of the disciplinary hearing. With regard to the October letter, Dr. Cohen testified essentially that:

> [H]is opinion in the October letter that Guran was "virtually incapacitated" related primarily to his patient's inability to travel frequently between his home in Florida and New York, as he understood would be required to participate in the disciplinary hearing. As the doctor explained, Guran's ailments

> gave him a poor sense of balance and made him susceptible to falls. Frequent travel heightened this risk. . . . He explained that the inability to concentrate noted in his letter related primarily to difficulty he perceived Guran would have focusing on other matters if he were in a situation where it was difficult for him to keep his balance.

Bellamy v. Cogdell, No. 90-4225 (E.D.N.Y June 28, 1991) (found at Joint Appendix, pp. 566-67). Significantly, based on a follow-up examination conducted on January 6, 1987—the day Bellamy's trial commenced and over two months after the October letter was written—Dr. Cohen further testified that he had placed no restrictions on Guran's practice of law and, more importantly, stated unequivocally that Guran's physical problems had no effect on his mental capacities, *i.e.*, there was nothing wrong mentally with Guran at the time of Bellamy's trial. After the evidentiary hearing, the trial court again denied Bellamy's motion to vacate his conviction, concluding that *at the time of trial*, [Guran] "was mentally and physically capable to try the defendant's case and did so in a competent manner." *People v. Bellamy*, Ind. No. 5382-85 (Queens Co. Sup. Ct. Jan. 31, 1989).

After exhausting state court remedies, Bellamy filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York, claiming, among other things, that he was denied effective assistance of counsel under the *per se* rule. The district court, in a well-reasoned opinion, rejected this claim, holding that the *per se* rule did not apply under the facts of this case. After thoroughly reviewing the record, the district court, agreeing with the trial court, found that there was "no evidence . . . of any mental infirmity" of Guran at the time of trial that impeded his ability to

present a defense, and that Guran in fact conducted a vigorous defense. I agree with the district court that the facts of this case are simply outside the ambit of this Court's *per se* Sixth Amendment jurisprudence.

As discussed above, we have applied the *per se* rule in a limited number of cases, namely when, unknown to the defendant, his or her attorney is not duly licensed, *see Novak*, 903 F.2d at 890; *Solina*, 709 F.2d at 167 or is engaged in the defendant's misdeeds. *Cancilla*, 725 F.2d at 870. Further, as the district court observed, we have advanced two rationales for applying the *per se* rule. The first is "jurisdictional" and applies in cases where the attorney is not duly licensed. It stems from the Supreme Court's decision in *Johnson v. Zerbst*, 304 U.S. 458, 468 (1948), that the failure to provide a criminal defendant with counsel created "a jurisdictional bar to a valid conviction." *See Solina*, 709 F.2d at 168-69 (discerning no meaningful distinction between total absence of representation and representation by unlicensed counsel). The second rationale is based on notions of conflict of interest, and applies in cases both where the lawyer is not duly licensed, *see Novak*, 903 F.2d at 890; *Solina*, 709 F.2d at 164 and where the lawyer is implicated in the crimes of his client. *See Cancilla*, 725 F.2d at 870. Under these circumstances, the defense is necessarily compromised because the advocate "cannot be wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his [or her] background and discover his" or her own wrongdoing. *Solina*, 709 F.2d at 164.

Under either rationale, it is plain that for a defendant to prevail on a *per se* claim, the defendant must show that his or her attorney had an actual substantive defect in licensure or an actual conflict of interest that existed *at*

the time of trial. See, e.g., Novak, 903 F.2d at 890; *Solina*, 709 F.2d at 164; *Cancilla*, 725 F.2d at 870; *see also United States v. Aiello*, 900 F.2d 528, 531-32 (2d Cir. 1990) ("theoretical or merely speculative conflict never invokes the *per se* rule").

In light of these principles, the majority's application of the *per se* rule to the facts of this case is wholly unwarranted. Neither rationale for our *per se* cases applies. Guran was duly licensed and admitted to the bar at the time of trial, thereby precluding application of the "jurisdictional" rationale. The mere pendancy of disciplinary charges during Bellamy's trial is an insufficient basis to treat Guran as if he were not licensed at that time. *See Waterhouse v. Rodriguez*, 848 F.2d 375, 383 (2d Cir. 1988). Moreover, Bellamy clearly had no conflict of interest at the time of trial that would have prevented vigorous advocacy on Bellamy's behalf.

The majority nonetheless advances two related grounds for applying the *per se* rule. First, analogizing this case to the fraudulently procured license in *Novak*, the majority finds that but for Guran's unfulfilled promise to have co-counsel at Bellamy's trial, Guran "almost certainly" would have been suspended before the trial. Second, the majority contends that Guran's statements of mental incapacity made in connection with his efforts to postpone his disciplinary hearing, which ultimately were relied on by the First Department to suspend Guran in late March 1987, are "perhaps more reason to fear inadequate representation" than if he had a conflict of interest. I do not believe that either ground justifies extending the *per se* rule to this case.

The majority's reliance on *Novak* is misplaced. Unlike the "attorney" in *Novak*, or the "attorney" in *Solina* for

that matter, Guran was, as discussed above, fully licensed and had been duly admitted to the New York bar for almost fifty years at the time of Bellamy's trial. Also, whereas the attorney in *Novak* certainly would not have been licensed and allowed to practice without his fraudulent misrepresentation, the effect on the First Department of Guran's promise to secure co-counsel is far less clear. As the district court observed, "[s]ince there is no 'conditional admission' to practice law in New York, this court cannot speculate . . . that [Guran] would have been suspended but for his representation that he would secure the assistance of other counsel." This is particularly so given the First Department's failure to respond to Guran's affidavit or to take action against him until well after Bellamy's trial. There is simply no justification to treat Guran as if he were not admitted and fully licensed to practice law at the time of Bellamy's trial.

In addition, Guran's representation to the First Department regarding the use of co-counsel does not approach the type of "institutional" fraud on the court present *Novak*. Although Guran apparently did not tell the trial court of his promise to secure the services of co-counsel, Guran made no attempt to conceal from the court his pending disciplinary hearing or his possible suspension for health reasons. To the contrary, Guran fully informed the court of his predicament, including his planned collaboration with Attorney Skeledsky. Indeed, the trial court contacted the First Department to determine whether Guran could represent Bellamy. Under these circumstances, it cannot be said that Guran's conduct approached the egregious deceptive behavior present in *Novak* or *Solina*, or that Guran, like the "attorneys" in *Novak* and *Solina*, was precluded from providing a vigorous defense

because he had something to hide. *See Aiello*, 900 F.2d at 531-32; *Waterhouse*, 848 F.2d at 383.

Slightly more troublesome are the statements contained in Dr. Cohen's October 29 letter and Guran's own statements in his December 12 affidavit regarding his inability to prepare for his disciplinary hearing, which formed the basis of Guran's suspension in late March 1987. However, that the First Department—without conducting a hearing to determine Guran's competence—ultimately suspended Guran based on statements made over three months earlier as to his then-existing state of health, is simply an insufficient basis upon which to conclude that Guran was not competent to defend Bellamy at the time of trial.

Indeed, the evidence adduced at the § 440 hearing through the testimony of Dr. Cohen—based on an examination Cohen conducted on Guran the day Bellamy's trial commenced—clearly demonstrated that Guran had no mental incapacity at the time of trial. This medical evidence was buttressed by the trial judge's own favorable observations regarding Guran's mental acuity and physical condition during the trial. Given this evidence, the district court agreed with the trial court's finding that at the time of trial, the relevant moment of inquiry, Bellamy was certainly competent to present a spirited defense. This factual finding—the import of which is wholly ignored by the majority—is amply supported by the record, is therefore not "clearly erroneous," *see* 28 U.S.C. § 2254(d), and precludes application of the *per se* rule in this case.

In sum, when a lawyer is duly licensed at the time of trial, when disciplinary proceedings against the lawyer have not resulted in an adverse ruling, and when the med-

ical evidence and observations of the trial judge establish that at the time of trial, the lawyer was mentally competent to represent the defendant, application of the *per se* rule is unwarranted. In finding a *per se* violation on this record, the majority unjustifiably opens the gates to *per se* Sixth Amendment challenges whenever a defendant can show that before and perhaps sometime after the defendant's trial, his lawyer had an illness that the *defendant* contends—contrary to the evidence—rendered the attorney incompetent at the time of trial.

Accordingly, I would affirm the district court's denial of Bellamy's petition for a writ of habeas corpus.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PERRY BELLAMY,

CV 90-4245(RR)

Petitioner,

-against-

MEMORANDUM AND ORDER

WILLIAM COGDELL, WARDEN,
Brooklyn House of Detention,

Respondent.

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APPEARANCES:

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By: Michael Ciaffa, Esq.

HONORABLE RICHARD BROWN
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By: Seymour Roth, Esq.
Assistant District Attorney

RAGGI, District Judge:

Perry Bellamy was convicted after a jury trial in Queens County of murder in the second degree, N.Y. Penal Law § 125.25 (McKinney 1987), and criminal possession of a weapon in the second degree, N.Y. Penal Law § 265.03 (McKinney 1987). Presently serving concurrent terms of incarceration of fifteen years to life and five to fifteen years respectively, Bellamy petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1988), claiming ineffective assistance of trial counsel and denial of due process. This court has reviewed the record of proceedings and finds the claim to be without merit. Accordingly, the petition is dismissed.

Background

1. *The Murder of Brian Rooney*

Sometime in 1985, Lorenzo "Fat Cat" Nichols, one of the most notorious drug dealers in Queens,[1] was arrested

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[1] In 1989, Nichols pleaded guilty in this district to two counts of racketeering and is awaiting sentence.

and incarcerated for violating his parole, largely as a result of the efforts of New York State Parole Officer Brian Rooney. From his jail cell Nichols vowed revenge. He ordered Rooney killed by two of his lieutenants, Howard "Pappy" Mason and Chris Williams. The "contract" was performed on the evening of October 10, 1985. Rooney was lured to the vicinity of Baisley Park in Queens by the petitioner, Perry Bellamy, who received $5,000 for his role in the crime. There, Mason and Williams, driving a green Datsun, approached Rooney's vehicle. Mason drew a gun and fired repeatedly until the officer lay dead.

2. *Suppression Hearing*

Bellamy inculpated himself in the Rooney murder in three statements made to the authorities on October 25, 1985. His retained counsel, Sidney Guran, moved to suppress the statements on grounds that they were coerced by police authorities. Guran contended that his client was held in police custody for over twelve hours, that during that time he was not advised of his rights, not permitted to make any telephone calls, and not given adequate food or drink.

Under such circumstances, his statements could not be deemed voluntary.

The trial court found otherwise, crediting the evidence adduced by the prosecution. Detective James Waddell testified that he had learned from an informant that petitioner had information pertinent to the Rooney murder. Waddell knew that Bellamy had cooperated with authorities in other contexts, even testifying in one drug case on behalf of the prosecution. Accordingly, at approximately 11:30 a.m. on October 25, 1985, he approached Bellamy on the street in Jamaica, Queens and asked him to accompany him to the police precinct. Bellamy agreed.

At the 113th precinct, Bellamy was asked to wait in a room generally used by police officers as a dormitory when they are spending the night at the station. Shortly thereafter, Bellamy was questioned by Sergeant Robert Plansker, who testified that he considered Bellamy a potential witness rather than a suspect, and free to leave had he wished to do so. Nevertheless, Plansker stated that he advised Bellamy of his rights pursuant to *Miranda v.*

Arizona, 384 U.S. 436 (1966), before beginning the interview since he did not know where petitioner's information would lead.

Petitioner told Plansker that on the day of the murder, he had flagged down Rooney's car and warned the officer that there was a contract out on his life. Rooney asked Bellamy to get in his car, whereupon they proceeded to the area of Sutphin Boulevard. Soon thereafter, petitioner saw a Datsun 280Z driven by Chris Williams approach. Pappy Mason, who was sitting in the passenger seat, drew a gun and fired repeatedly at Rooney. Bellamy jumped out of the car and fled into Baisley Park.

Given the significance of Bellamy's statement, Plansker told petitioner he would likely be considered a material witness. He further advised Bellamy that the authorities would be willing to put him up in a hotel to assure his safety.[2]

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[2] At trial, it was revealed that Bellamy had previously spent five days in a hotel under police guard when he testified as a prosecution witness against Daniel Staley, another Queens drug dealer with a propensity for violence.

Bellamy remained in the 113th precinct dormitory for the next several hours, occasionally dozing on the cots. At approximately 8:00 p.m., he was escorted to the office of the Queens District Attorney in order to make a videotaped statement. Prior to doing so, Bellamy was again interviewed, this time by Detective Bernard Steffen, who advised him of his rights before asking him to recount the events of the murder. In this second statement, Bellamy implicated himself more directly in the crime, stating that several weeks before the shooting, while in the Queens House of Detention, he had overheard Nichols cursing his parole officer and stating "he's going to get what's coming to him." On October 9, 1985, the day before the murder, Bellamy was told by one of Nichols' associates "to go meet this PO" at a specific location in Queens. The next day, Bellamy was present when that same individual placed a telephone call to Rooney telling him to meet petitioner on Sutphin Boulevard. When Bellamy met Rooney at the assigned spot, the officer asked where the individual was who had placed the call. Bellamy directed Rooney to a

location near Baisley Park. There Mason shot him dead. Mason then ordered Bellamy to get into the car and threatened his life and that of his family if Bellamy ever revealed what he knew of the murder.

Thereafter, at approximately 11:30 p.m., Bellamy repeated the same statement on videotape after once again being advised of his rights, this time by an assistant district attorney.[3] He was then taken to the Marriott Hotel in Queens where, under guard, he spent the night along with other potential witnesses.

The next evening, after his statements were reviewed by supervisors in the district attorney's office, Bellamy was arrested and formally charged with aiding and abetting the murder of Brian Rooney.

In a memorandum dated June 26, 1986, the trial court denied the suppression motion, finding from the totality of circumstances that Bellamy was not in custody at the time he made any of the three statements at issue. To the contrary,

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[3] The court has not been provided with either the videotape or a transcript. A review of the entire trial record, however, suggests that this third version of events was substantially similar to the second.

the court found that he remained free to leave throughout the evening and night of October 25, 1985. The court further denied suppression based on its finding that Bellamy was properly advised of his rights before any police questioning, voluntarily waived those rights, and voluntarily made statements to the authorities. *People v. Bellamy*, Ind. No. 5382-85 (Queens Co., Sup. Ct. June 26, 1986).

3. *Trial*

Over the course of the three-week trial, the prosecution offered, in addition to evidence establishing the death of Officer Rooney and Bellamy's statements to the authorities, another statement made by petitioner to Larry Robinson, with whom he was housed on Rikers Island while awaiting trial. Robinson testified that Bellamy had admitted his participation in the Rooney murder, stating that he had assisted in the crime because he needed money and acknowledging receipt of $5,000 for his efforts.

Defense counsel moved for a mistrial or the striking of Robinson's testimony on the ground that it had been procured in violation of Bellamy's sixth amendment right to

counsel as set forth in *Maine v. Moulton*, 474 U.S. 159 (1985). The prosecution opposed the motion, arguing that Robinson's testimony made clear that he had not been acting under police direction in procuring the statement. To the contrary, the evidence showed that Robinson "reached out" for the authorities only after conversing with petitioner. The trial court denied the defense motion.

An affirmative defense case was presented to the jury through the testimony of five witnesses. These included Assistant District Attorney Daniel McCarthy, who confirmed Bellamy's significant cooperation in the prosecution of Daniel Staley; Captain Louis Fisher of the New York City Corrections Department, who testified to the limited access Larry Robinson had to Bellamy while the two were housed near each other on Rikers Island; Robert McCray, a witness to the Rooney shooting who could not identify Bellamy as one of the persons on the scene; and Annie Bellamy, petitioner's mother.

The critical defense witness, however, was Perry Bellamy himself. He admitted being with Brian Rooney the

night the officer met his death, but explained that it was Rooney who approached him, soliciting his testimony at Nichols' parole violation hearing. He was driving with Rooney to Nichols' sister's home when Pappy Mason shot the officer dead. At the sound of the gunfire, Bellamy fled the scene.

Bellamy further admitted having overheard Nichols put out a contract on Rooney some time before the shooting. He claimed to have conveyed this information to a Detective Cunihan. Indeed, Bellamy claimed to have called Cunihan again three days after the shooting. That officer promised to get back in touch with him. In fact, he did not do so.

Bellamy denied voluntarily accompanying any police officers on October 25, 1985. He stated that the police threatened to "take him" if he did not accompany them peacefully. He claimed to have been strip-searched at the police precinct and to have been questioned by, on occasion, as many as ten officials. He denied ever being advised of his rights. Moreover, he stated that his requests to speak to ADA McCarthy, his lawyer and his mother were ignored.

Bellamy further denied ever telling Larry Robinson that he had assisted in the Rooney homicide. He did admit talking with Robinson, but testified that their conversation related to his decision to accept a $5,000 bribe being offered to insure that he did not testify against any of the Nichols crew.

The evidence adduced by the defense, both from its own witnesses and through cross-examination of prosecution witnesses, permitted counsel to argue cogently on Bellamy's behalf that it was simply incredible to think that Nichols and his crew, in plotting the death of a law enforcement officer, would rely on an individual well-known for having already cooperated with the prosecution to help them with their plan. Counsel urged the jury to discount Bellamy's own statements to the authorities as the unreliable product of both subtle and direct pressure exerted by members of a police department that, having ignored Bellamy's warning that Rooney was in danger, needed to make him a scapegoat to cover up its own ineptitude. Larry Robinson's testimony was dismissed as

that of an incarcerated felon eager to say anything to curry favor with the authorities.

The jury's resolution of the case was by no means easy. Only after five days of deliberation did it return its verdict of guilty.

4. *Guran Disciplinary Proceedings*

In the months immediately preceding and throughout the Bellamy trial, petitioner's counsel, Sidney Guran, was the subject of disciplinary proceedings before the First Department. He was formally charged with professional misconduct by the Departmental Disciplinary Committee on October 20, 1986, in connection with his alleged 1976 conversion of client funds to his own use and his alleged 1977 negligent handling of a real estate transaction, including the unauthorized signing of his client's name to a legal document. Guran was called upon to address these charges at a scheduled hearing.

On November 10, 1986, Guran's counsel, Richard L. Baltimore, requested an adjournment stating that more time was needed to compile documents and that Mr. Guran "is

not mentally capable of preparing for the hearing." This latter claim was supported by (1) counsel's representation that in telephone conversations with his 72-year old client -- who was then living in Orlando, Florida -- "I find a certain amount of disorientation," and (2) a "To whom it may concern" letter from Guran's New York physician, Dr. Richard P. Cohen, detailing his patient's various ailments. All of these were physiological in origin, including progressive polyneuropathy, a condition characterized by peripheral motor weakness and unsteadiness, for which Guran had been undergoing evaluation for the preceding six weeks. The doctor did note, in connection with this ailment, that Guran suffered "at times" from "an inability to concentrate." Indeed, given the prescribed medications and the "severe physical and emotional stress" resulting from the condition, the doctor stated that Guran "has been affected emotionally and physically, and has been virtually incapacitated over the last six to eight weeks." Moreover, he estimated that evaluation and treatment of this problem

"will take at least three to six months, and that Mr. Guran will be effectively incapacitated during that time."

In light of this submission, as well as the underlying charges, the Disciplinary Commission, on November 21, 1986, petitioned the First Department to suspend Guran indefinitely from the further practice of law.

In response and opposition, Guran himself submitted an affidavit to the court dated December 12, 1986. Therein he stated that there was no need for suspension since he was in essence retired, having taken on no new work since 1984 with the exception of the defense of Perry Bellamy. Guran explained that he had represented Bellamy in the past and had the client's trust. Guran stated:

> I, of course, will not attempt to try this case by myself. I will have a competent attorney, but I must be present to assist him. Bellamy relies on, and strictly trusts only me and his mother has paid me. It would be a complete disservice to this defendant and jeopardize his right to a fair trial if I were not permitted to assist in his trial and defense.

No response was forthcoming from either the Disciplinary Committee or the First Department for several months.

On December 11, 1986, Guran did advise the trial judge assigned the *Bellamy* case, in an *ex parte* submission, of the disciplinary charges pending against him and the subsequent motion to suspend him until such time as he was healthy enough to respond thereto. Guran explained that he had opposed suspension as unnecessary in light of his virtual retirement. As to his representation of Bellamy, he reported feeling "better" and advised that he had "secured the services of Marvin D. Skedelsky, Esq." to assist him in the trial. He did state that if he himself could not participate in the trial, Skedelsky would not be prepared to go forward on the scheduled trial date. Although Guran noted that he had spoken with the prosecutor about the matter, the record does not indicate that he ever spoke to his client. Indeed, both petitioner and his mother subsequently submitted affidavits to the contrary.

At trial, Guran represented Bellamy without the assistance of any other attorney.

On March 26, 1987, the Appellate Division, First Department, suspended Sidney Guran from the further practice of law. No hearing was conducted on the underlying charges. Instead, the basis for suspension was Guran's own representation that he was not mentally capable of preparing for a hearing, a representation that "implicitly concedes that he is, at this time, incapable of practicing law." *In the Matter of Sidney J. Guran*, M-5476 (N.Y. App. Div., 1st Dep't Mar. 26, 1987).

5. *State Court Challenges to the Competency of Trial Counsel*

a. *Sentencing*

Petitioner first challenged the competency of his trial counsel at sentence on April 16, 1987.[4] Speaking on his own behalf, Bellamy advised the court: "Mr. Guran was not a fit lawyer to . . . represent me properly because of his medical health and other reasons. The court initially

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[4] Marvin Skedelsky did represent petitioner on that occasion.

refused to adjourn the case, sentencing defendant to a term of fifteen years to life on the murder charge and five to fifteen years on the firearms charge. That same day, the court vacated sentence and advised Bellamy that it would appoint new counsel for him.

b. *440 Motion*

On June 15, 1987, counsel moved to set aside Bellamy's conviction on grounds of ineffective assistance of trial counsel and denial of due process. N.Y. Crim. Proc. Law §440.10(a) and (h) (McKinney 1983). The factual and legal bases for this motion are identical to those pursued on this petition.[5]

The motion was summarily denied on July 30, 1987 and petitioner sentenced to twenty-five years to life incarceration on the murder count. Upon Bellamy's request for reconsideration, the court, on September 14, 1987, ordered a hearing to determine the competency of trial counsel.

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[5] Indeed, it is the same counsel who pursues these claims on petitioner's behalf before this court.

The principal witness at this hearing was Dr. Richard P. Cohen, a specialist in internal medicine. He confirmed his authorship of the letter sent to the First Department in support of Guran's request for an adjournment of his disciplinary committee hearing. He explained that his opinion that Guran was "virtually incapacitated" related primarily to his patient's inability to travel frequently between his home in Florida and New York, as he understood would be required to participate in the disciplinary hearing. As the doctor explained, Guran's ailments gave him a poor sense of balance and made him susceptible to falls. Frequent travel heightened this risk. Dr. Cohen was clear, however, in stating that Guran's problems had not affected his mental capacities and that he had never placed any restrictions on his patient's work activities. He explained that the inability to concentrate noted in his letter related primarily to difficulty he perceived Guran would have focusing on other matters if he were in a situation where it was difficult for him to keep his balance.

Also testifying at the hearing were Marvin Skedelsky, Esq. and Victor Knapp, Esq., both of whom stated that Guran had approached them about assisting in Bellamy's defense. Knapp was unable to do so because of his representation of co-defendant Pappy Mason. He did recall one conversation with Guran during the *Bellamy* trial during which counsel had a "few second" memory lapse. Skedelsky acknowledged originally telling Guran that he would be available to assist him during the *Bellamy* trial. When Guran tried to reach him at the time of trial, however, Skedelsky was committed elsewhere. Petitioner's mother testified to her impression that Guran was tired and weak during the trial and that her statements to him were not "sink[ing] in."

Further adduced at the hearing was evidence that Guran had been given, prior to the commencement of the suppression hearing in the *Bellamy* case, a copy of the police report detailing the confidential informant interview conducted by Detective Waddell before he spoke with petitioner, and a copy of Bellamy's prior criminal history. It was also established that prior to trial Guran had been

given notes of contacts between law enforcement officials and Larry Robinson.

Neither Guran nor petitioner testified at the hearing.[6] Although counsel for Bellamy sought to call Guran, then in Florida, the request was denied by the court.

In a written memorandum and order dated January 31, 1989, the court denied petitioner's motion to vacate his conviction. *People v. Bellamy*, Ind. No. 5382-85 (Queens Co., Sup. Ct. Jan. 31, 1989). It first rejected the contention that trial counsel was not mentally or physically able to conduct the trial.

> There was no evidence of mental or emotional aberrations in his handling of this case nor [were] there any signs of physical incapability. It is true that counselor required the use of a cane, but that is far from the physical disability contemplated in the above cases. As to the fact that he exhibited marks of fatigue and appeared tired, these symptoms could not be considered unusual in a three-week case involving a charge of murder.

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[6] Bellamy did submit an affidavit in support of his motion, stating inter alia that Guran looked ill during the trial and had little energy.

Dr. Cohen's letter was viewed simply as a document "to secure an adjournment of counsel's pending disciplinary action until Guran could regain his emotional equilibrium." The court was satisfied that the passage of two months between the time of the letter and the trial had permitted counsel to do that to a considerable extent.[7] The court similarly dismissed the post-verdict claims of petitioner and his mother about Guran's trial performance in light of their failure to raise the issue during the trial.

The court further rejected as legally unsupported Bellamy's claim that the trial court was obliged to inquire as to his awareness that his attorney was facing suspension on grounds of incapacity. Bellamy's claims that his lawyer's incompetence was evidenced by his failure to cite *People v. Bartolomeo*, 53 N.Y.2d 225, 440 N.Y.S.2d 894 (1981), in

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[7] In the weeks immediately preceding Dr. Cohen's letter, Guran was tested for possible amyotrophic lateral sclerosis, a form of non-infectious polio commonly referred to as Lew Gehrig's Disease. This possibility was only ruled out in late October. Although, according to Dr. Cohen's testimony, Guran's physical condition did not improve between the fall of 1986 and January 1987, the mere fact that he was concerned about a possibly life-threatening disease in October 1986, and had had these fears assuaged by January 1987, is of some significance in assessing such issues as the lawyer's "ability to concentrate."

support of his motion to suppress his statements, and his failure to move earlier for the suppression of the Robinson statement, were dismissed as without merit.

6. *Appellate Review*

Bellamy sought leave to appeal the denial of his 440 motion to the Appellate Division. Indeed, he argued that he was entitled to such an appeal as of right, and that those New York statutes that authorize only permissive appeal are unconstitutional. The latter argument was rejected by the Appellate Division on April 16, 1990, in a decision that also affirmed Bellamy's conviction on direct appeal. *People v. Bellamy*, 160 A.D.2d 886, 554 N.Y.S.2d 320 (2d Dep't 1990). Therein, the court further upheld the trial court's refusal to suppress Bellamy's statements to the authorities finding that the statements "were not the result of custodial interrogation," and that, in any event, Bellamy had failed to establish that he was, in fact, represented by counsel at the time the statements were made. *Id.* The court did, however, remand the case for resentencing in light of the

trial court's failure to state its reasons for imposing a term of imprisonment greater than originally imposed.[8]

On May 9, 1989, the Appellate Division summarily denied Bellamy's petition for leave to appeal from the trial court's denial of his 440 petition. *People v. Bellamy*, Ind. No. 5382-85 (N.Y. App. Div., 1st Dep't May 9, 1989).

Leave to appeal from the affirmance of his conviction was also summarily denied by the Court of Appeals. *People v. Bellamy*, 76 N.Y.2d 784, 559 N.Y.S.2d 989 (1990).

Discussion

I. *Exhaustion of Remedies*

A federal district court may only reach the merits of a petition for habeas corpus pursuant to 28 U.S.C. § 2254 if the state prisoner has first exhausted all available state avenues of review. *Rose v. Lundy*, 455 U.S. 509, 522 (1982); *Asherman v. Meachum*, 932 F.2d 137 (2d Cir. 1991); *Petrucelli v. Coombe*, 735 F.2d 684, 687 (2d Cir.

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[8] It was on remand that the trial court imposed the fifteen-years-to-life term of incarceration for the murder conviction that petitioner is presently serving.

1984). To satisfy this requirement, petitioner must have fairly presented for the state court's consideration both the same factual bases and legal premises as are at issue in his federal petition. *See, e.g., Picard v. Connor*, 404 U.S. 270, 276-77 (1971); *Asherman v. Meachum, supra.*

Respondent here urges dismissal claiming that Bellamy's failure to present his ineffective assistance claim on direct appeal reflects non-exhaustion. This court disagrees. The record amply supports the conclusion that the ineffectiveness claim was more properly addressed through a 440 motion, which Bellamy did pursue, rather than on direct appeal. The 440 court did, after all, order an evidentiary hearing to resolve the claim. Had the matter been capable of resolution on the trial record, the 440 court would have been required, under New York law, to dismiss the petition, not hold a hearing. *See* N.Y. Crim. Proc. Law § 440.10(2)(c); *People v. Satterfield*, 66 N.Y.2d 796, 497 N.Y.S.2d 903 (1985); *Cappiello v. Hoke*, 698 F. Supp. 1042, 1052 (E.D.N.Y. 1988), *aff'd*, 852 F.2d 59 (2d Cir. 1988). Accordingly, this court finds that, once Bellamy's

motion seeking leave to appeal the denial of his 440 motion was denied, he had done all that could reasonably be expected to present his claim to the state courts. *See Klein v. Harris*, 667 F.2d 274, 283-84 (2d Cir. 1981) (denial of leave to appeal from 440 denial fully exhausts state remedies). This court proceeds to the merits.

II. *Ineffective Assistance of Counsel*

Bellamy raises various constitutional challenges to his conviction all stemming from his contention that retained counsel, Sidney Guran, did not provide him with the sort of representation contemplated under the sixth amendment. Thus, Bellamy claims that the record reveals both a *per se* denial of the right to counsel and ineffective representation pursuant to the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). He further contends that the trial court denied him due process in failing to conduct a pretrial inquiry into his counsel's competence and in failing to require Guran to testify in the 440 hearing.

A. *Alleged "Per Se" Violation*

The sixth amendment to the Constitution guarantees an accused person the right to effective assistance of counsel at all critical stages of a criminal proceeding. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984); *United States v. Novak*, 903 F.2d 883, 886 (2d Cir. 1990).

When a defendant who has been represented by counsel challenges his conviction on sixth amendment grounds, he generally bears the heavy burden of establishing both that the alleged deficiencies in his counsel's performance caused the representation afforded to fall below an objective standard of reasonableness, *Strickland v. Washington*, 466 U.S. at 688, and that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different, *id.* at 694.

In a small category of cases, the Second Circuit has found represented defendants denied sixth amendment protection even absent evidence satisfying either prong of the *Strickland* standard. These *"per se"* violations have,

however, generally been limited to cases where (1) unbeknownst to the defendant, his lawyer "was not authorized to practice law in any state," *see, e.g., Solina v. United States*, 709 F.2d 160, 167 (2d Cir. 1983); *accord United States v. Novak*, 903 F.2d 883 (2d Cir. 1990) (lawyer who gains admission to the bar by fraudulently representing his qualifications to practice treated as one who has never been duly admitted); or (2) counsel was himself involved in criminal conduct akin to that for which his client was being tried, *see, e.g., United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984).

Petitioner urges the extension of the *per se* rule to his case, arguing that his attorney had represented himself mentally and physically incapable of participating in court-related matters only two months before his trial; was in fact suspended two months after his trial on the basis of his representations; and had misled the state courts into thinking that he would not try petitioner's case by himself.

These facts do not, however, fit within the confines of the two rationales generally cited to support findings of

per se violations of the sixth amendment. The first rationale is jurisdictional and pertains to lawyers not duly admitted to practice. It derives from the Supreme Court's holding in *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938), that a defendant's failure to be represented by counsel constitutes "a jurisdictional bar to a valid conviction . . . ." Although Judge Friendly, writing for the Circuit in *Solina*, labelled this a "somewhat surprising thesis," *Solina v. United States*, 709 F.2d at 169, he found no principled grounds to distinguish the jurisdictional point as between total absence of representation and representation by an individual not duly licensed to practice.

This case does not present such a jurisdictional problem. Trial counsel had been duly admitted to practice law in New York for forty years before petitioner's trial. Admittedly, counsel was the subject of disciplinary proceedings at the time of Bellamy's trial. Further, he had managed to delay those proceedings by citing to his own mental and physical ailments. But at the time of trial, the state court had neither suspended counsel nor even sought to

limit his practice of law. Absent any such action, the mere fact of disciplinary proceedings is not enough to evidence a *per se* violation of the sixth amendment. *See generally Waterhouse v. Rodriguez*, 848 F.2d 375 (2d Cir. 1988) (no *per se* violation in representation by lawyer who is subject of disciplinary proceeding until lawyer actually suspended and receives notice of same).

The second rationale for finding a *per se* violation of the sixth amendment applies both to those cases where counsel was not duly licensed and those cases where counsel was involved in the misdeeds of his client. In both situations, courts have expressed concern that a lawyer's duty vigorously to represent his client might be compromised by his fear that the prosecutor or trial judge would inquire into his background and there discover that he was acting in violation of the law. *See Solina v. United States*, 709 F.2d at 164; *accord United States v. Novak*, 903 F.2d at 890.

In this case, however, trial counsel had no reason to think that forceful advocacy would expose him to criminal liability or any other sanction. The charges giving rise to

the pending disciplinary proceeding were unrelated to his representation of Bellamy. Indeed, the very nature of the charges may have provided counsel with a particular incentive to represent Bellamy with force and vigor. *See Waterhouse v. Rodriguez*, 848 F.2d at 383; *see also United States v. Aiello*, 900 F.2d 528, 532 (2d Cir. 1990) (*per se* rule inapplicable to case of duly admitted lawyer under investigation for criminal conduct wholly unrelated to charges on which client stands trial).

Despite the absence in this case of either basis relied on by the courts to support findings of *per se* sixth amendment violations, petitioner nevertheless seeks to analogize his situation to that at issue in *United States v. Novak*, *supra*. Therein, the court found a *per se* violation of the sixth amendment in a defendant's representation by an attorney who had *secured* admission to the bar by misrepresenting his qualifications. Bellamy argues that here counsel *retained* membership in the bar by misrepresenting that he would not try petitioner's case alone. The two situations are not as neatly parallel as petitioner contends.

There is simply no question that without the misrepresentations in the *Novak* case, counsel would never have been admitted to practice. Moreover, because of the misrepresentations there was "no foundation for an assumption that defense counsel had the legal skills necessary to permit him to become a 'duly admitted' member of the bar." *United States v. Novak*, 903 F.2d at 890. In this case, Guran was duly admitted to the bar. In this context, it is far from clear what effect, if any, his subsequent statements had on the Appellate Division, which, after all, took no action on them until well after Bellamy's trial was concluded. Since there is no "conditional admission" to practice law in New York, this court cannot speculate, as petitioner urges, that counsel would have been suspended but for his representation that he would secure the assistance of other counsel. Moreover, the *Novak* court did emphasize that its *per se* finding was based largely on the possibility that a defendant might have been denied vigorous representation by an attorney who properly feared that a prosecutor or judge might inquire into the circumstances of

his admission. The total absence of this concern from this case makes reliance on *Novak* inappropriate.

Of course, the real problem in this case is not so much counsel's statement to the Appellate Division that he would seek the assistance of another lawyer in defending petitioner. It is his statement that he was not physically or mentally capable of participating in disciplinary proceedings. In essence, petitioner is urging this court to find that, because the statement was ultimately relied upon by the state courts to suspend Guran, it is *per se* evidence of ineffectiveness for any representation afforded between the time when it was made and the time when counsel was formally suspended. This the court declines to do, particularly in light of the record, which (1) suggests that Guran's self-serving representations to the Appellate Division about his condition were somewhat overstated, and (2) amply supports the trial court's findings that Guran effectively represented petitioner at trial.

At the 440 hearing, Guran's own doctor stated that his patient's incapacity was primarily physical, not mental.

The physical problem was, at one time, thought to be amyotrophic lateral sclerosis, a possibility ruled out only in the fall of 1986. It is conceivable that until Guran's fears in this regard were assuaged he was distracted and unable to concentrate on other matters. But this matter having been resolved some time before trial, there is no basis for thinking Guran unfit to give thoughtful consideration to petitioner's defense.

Indeed, Dr. Cohen stated that the primary reason for labelling Guran incapacitated was his reduced sense of balance, which rendered him particularly susceptible to falls if placed in conditions of frequent movement as would be the case if Guran had to travel from Florida to New York on a regular basis. Of course, this concern might have been minimized had it been brought more clearly to the attention of the Appellate Division, which could have scheduled its disciplinary hearings on sequential days. Counsel is to be faulted for not raising this possibility, rather than giving the impression of complete incapacitation. To this extent his submission to the Appellate Division may have been

exaggerated and misleading. That, however, is not the issue before this court, and is hardly a basis for finding a *per se* violation of the sixth amendment in his representation of petitioner. The fact remains that, after extensive questioning of Guran's treating physician, no evidence was adduced of any mental infirmity. The trial court was entitled to conclude from the hearing evidence, as well as from its own observations of Guran throughout trial, that he was perfectly competent to conduct the defense.

No reviewing court, whether state or federal, enjoys the same first-hand insight as the trial court into counsel's actual performance. A careful review of the entire trial transcript, however, persuades this court that the finding of competency was fully supported by the record. Guran did not limit his defense to any formulistic challenge to the sufficiency of the government's case. He carefully and often shrewdly cross-examined many of the prosecution witnesses. He called numerous witnesses, including the defendant, who was obviously well prepared for his testimony. He gave a summation that was thoughtful, articulate and at times

persuasive in its contention that the last person major drug dealers would use to set up a law enforcement officer was a known informant such as Bellamy.

Where a defendant has been represented by duly licensed counsel, where disciplinary proceedings against that counsel have not yet resulted in any adverse ruling, where a hearing on counsel's mental and physical condition at the time of trial amply supports a finding of his mental competence to present a defense, and where the trial record reveals that a defense was advanced cogently and vigorously, this court finds no basis for concluding that petitioner has sustained a *per se* violation of his sixth amendment right to counsel.

The petition for habeas corpus relief on this ground is denied.

B. *The "Strickland v. Washington" Standard*

Petitioner contends that even if this court were not to find a *per se* violation, his counsel's representation fell below the standards set forth in *Strickland v. Washington*, *supra*. In fact, petitioner's burden of establishing both that

his counsel's representation fell below prevailing professional norms and that, but for the errors, a different outcome was likely, is a heavy one. A "strong presumption" operates that counsel's conduct falls within "the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. at 689. In this case, petitioner contends that a factual hearing at which his trial counsel is required to testify is necessary to establish ineffective representation. This court disagrees. The record, whether reviewed in its entirety, *see Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (generally appropriate to consider counsel's overall performance in assessing an alleged omission), or in light of petitioner's discrete complaints, fails to demonstrate any deficiency sufficient to satisfy *Strickland*.

1. *Suppression of Petitioner's Statements to the Authorities*

Petitioner complains that his trial counsel, in moving to suppress his statements to the authorities should not have argued simply that the statements were involuntary, but should have cited the court to *People v. Bartolomeo*, 53

N.Y.2d 225, 440 N.Y.S.2d 894 (1981), a case holding that when police are aware that a suspect in custody is represented by counsel, albeit on an unrelated charge, they are absolutely precluded by the New York Constitution from interrogating that individual in the absence of his counsel.[9]

In this case it is clear that invocation of *Bartolomeo* would have made no difference to the outcome of the suppression motion. *Bartolomeo* applies only to custodial interrogations. *See People v. Bartolomeo*, 53 N.Y.2d at 231, 440 N.Y.S.2d at 897; *cf. People v. Bertolo*, 65 N.Y.2d 111, 116, 490 N.Y.S.2d 475, 479 (1985) (no *Bartolomeo* violation in non-custodial questioning of represented individual). The trial court, however, specifically found that petitioner was not in custody at the time he made the statements at issue. Rather, he voluntarily accompanied the police to the state and spoke with them despite the fact that he was free to leave. This finding was expressly affirmed

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[9] Petitioner contends that the police should have known that he had been arrested only a short time before the October 25, 1985 interview. Not insignificantly, *Bartolomeo* has recently been overruled by the New York Court of Appeals. *See People v. Bing*, 76 N.Y.2d 331, 559 N.Y.S.2d 474 (1990).

by the Appellate Division on direct appeal. Such a finding of fact is entitled to a "high measure" of deference by a federal court reviewing the issue on a petition for habeas corpus. *See* 28 U.S.C. § 2254(d) (1988); *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). This court's own review of the hearing transcript reveals that the finding is fairly supported by the record, particularly in light of petitioner's background as a police informant.

In this light, it can neither be said that counsel's failure to cite *Bartolomeo* was professionally unreasonable, nor that, but for the failure, the petitioner's statements would likely have been suppressed.

2. *Suppression of Petitioner's Statement to Robinson*

Bellamy further claims that his trial counsel's failure to move to suppress his statement to Larry Robinson before trial constituted ineffective assistance in light of *Maine v. Moulton*, 474 U.S. 159 (1985). As the record demonstrates, counsel did invoke *Maine v. Moulton* after Robinson testified to support a motion to strike his testimony or, in the alternative, grant a mistrial. Thus, the issue before the court

is not whether the failure to make the motion altogether constituted ineffective assistance, but whether the failure to raise it sooner denied petitioner rights secured by the sixth amendment. This court finds that the motion was unlikely to succeed at any time and therefore that its tardy presentation did not constitute a sixth amendment denial.

In *Maine v. Moulton*, *supra*, the Supreme Court held that the procurement of a defendant's post-indictment statement by the active use a government informant must be suppressed as violative of the sixth amendment. In this case, Robinson's own trial testimony revealed that he was not an informant at the time he spoke to Bellamy. Only after their meeting did he have his lawyer approach the prosecutors in an effort to exchange his information for better treatment on his own case. This scenario would not demonstrate "knowing exploitation by the State of an opportunity to confront the accused" in the absence of his counsel. *See Maine v. Moulton*, 474 U.S. at 176; *accord United States v. Cruz*, 785 F.2d 399, 408 (2d Cir. 1986) (no sixth amendment violation where proof demonstrates that

government did not put informant on same floor as indicted defendant for purpose of eliciting information from him).

There being no basis to conclude that a motion to suppress Robinson's statements would have been any more likely to succeed pretrial than when raised in the midst of trial, the court finds no sixth amendment denial.

C. *Due Process Denials*

Bellamy contends that due process imposed upon the trial court an independent duty to inquire into counsel's competency and, indeed, to order either his withdrawal from the case or the appointment of additional counsel. In support of this argument he cites various cases discussing a trial court's obligation to ensure representation consistent with the sixth amendment when it is made aware of a possible conflict of interest. *E.g.*, *Holloway v. Arkansas*, 435 U.S. 475 (1978). Although this court agrees that further inquiry prior to trial would have been appropriate in this case,[10] it

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[10] The trial court, in denying Bellamy's § 440 motion, held that it would not have been appropriate for it to interfere with the relationship between a defendant and retained counsel by ordering either that counsel withdraw or be assisted by another attorney. This conclusion is subject (continued...)

does not conclude, in light of the findings made at the 440 hearing, that due process was here denied.

Preliminarily, the court notes that the trial court was plainly aware, by virtue of an *ex parte* communication from Sidney Guran himself that counsel's medical condition was the basis for a pending motion to suspend him from the practice of law. *Cf. Cuyler v. Sullivan*, 446 U.S. 335 (1980) (court not required to inquire into conflicts of which it is unaware). Under such circumstances, the court should have taken steps to ensure both (1) that defendant was aware of the situation; and (2) that counsel was sufficiently well to render the sort of representation contemplated by the sixth amendment. The failure to make such inquiry does not, however, by itself, warrant granting habeas corpus relief. *See generally United States v. Edwardo-Franco*, 885 F.2d

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[10](...continued)
to some question. *See generally Wheat v. United States*, 108 S. Ct. 1692, 1698 (1988) (trial court has power to decline proffer of waiver of any challenge to counsel's conflict of interest by jointly represented defendants). In any event, by thus focusing exclusively on Bellamy's claim that substitute or additional counsel should have been ordered, the trial court overlooked the possibility of conducting at least an inquiry to ensure that defendant was aware of the situation and thus able to make informed choices about his counsel.

1002, 1007 (2d Cir. 1989) (failure of court to make proper inquiry of defendants in case of dual representation does not automatically entitle them to new trial; burden shifts to government to show no prejudice). Indeed, in *Wood v. Georgia*, 450 U.S. 261, 274 (1981), the Supreme Court held that, when a court fails to hold a hearing on the question of conflict, the appropriate relief is a remand to determine whether an actual conflict was indeed present. *Accord Bonin v. California*, 110 S. Ct. 1506, 1508 (1990) (Marshall, J.) (dissenting from denial of certiorari) (trial court's failure to conduct necessary inquiry warrants remand for determination as to whether actual conflict exists).

In this case, no remand is necessary since the state court did ultimately hold a hearing on counsel's competency in conjunction with petitioner's 440 application. Detailed testimony at that hearing from Guran's treating physician, coupled with the trial court's own observations of counsel's performance during trial, established that no physical or mental infirmity prevented Guran from providing petitioner with a thoughtful and vigorous defense. As already noted,

this conclusion is amply supported by both the trial and hearing records.

Petitioner complains that this hearing record cannot be relied on because the state court refused to order Guran himself to testify. Indeed, petitioner argues that this refusal itself constituted a denial of due process warranting issuance of a writ of habeas corpus.

A serious question exists as to the propriety of entertaining on federal habeas such a challenge to state court collateral review of a conviction. The majority of circuits that have considered the issue have held that such claims are not cognizable pursuant to § 2254. *See, e.g., Conner v. Director of Div. of Adult Corrections*, 870 F.2d 1384, 1386-87 (8th Cir.), *cert. denied*, 110 S. Ct. 363 (1989); *Bryant v. State of Maryland*, 848 F.2d 492, 493 (4th Cir. 1988); *Kirby v. Dutton*, 794 F.2d 245, 247-48 (6th Cir 1986); *Vail v. Procurier*, 747 F.2d 277 (5th Cir. 1984) (per curiam). Only the First Circuit has held to the contrary. *See Dickerson v. Walsh*, 750 F.2d 150, 152-54 (1st Cir. 1984). The Second Circuit has yet to address the issue.

Even if it were appropriate to address the issue on the merits, this court would not find the state court's failure to require the testimony of Guran at the 440 hearing sufficient to constitute a denial of due process. The state court had already observed him throughout a lengthy and complex trial. That observation lent no support to the claim that counsel was too ill or distracted to render competent representation. At the hearing, the court heard from Guran's treating physician. That testimony served to ensure that the lay observations made in the course of trial were not contradicted by medical findings. Petitioner fails to set forth with any particularity what further evidence would have been adduced had Guran testified that would have undermined the factual findings of competency.

Trial counsel's competency having been established at an evidentiary hearing, and that finding being amply supported by the evidence, petitioner's due process challenge to his conviction is dismissed as without merit.

CONCLUSION

Bellamy's claim that his conviction was obtained in violation of his rights to effective representation of counsel and due process is without merit. Accordingly, his petition for habeas corpus relief is denied. The court does, however, grant a certificate of probable cause to appeal.

SO ORDERED.

Dated: Brooklyn, New York
June 28, 1991

/s/
REENA RAGGI
UNITED STATES DISTRICT JUDGE